CHAPTER ES.
Executive Summary

The Indiana Department of Transportation (INDOT) retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help inform the agency's efforts to comply with the State of Indiana's Minority and Women's Business Enterprises (MBE/WBE) Program and the agency's implementation of the Federal Disadvantaged Business Enterprise (DBE) Program. The MBE/WBE Program is designed to encourage the participation of minority- and woman-owned businesses in state contracting and to create a fair, competitive, and equitable environment for those businesses. The Federal DBE Program is designed to address potential discrimination against DBEs in the award and administration of United States Department of Transportation (USDOT)-funded contracts. Both programs comprise various measures to encourage the participation of minority- and woman-owned businesses including *race- and gender-neutral* measures—which are designed to encourage the participation of all businesses—and, potentially, *race- and gender-conscious* measures—which are designed to specifically encourage the participation of minority- and woman-owned businesses (e.g., using DBE or MBE/WBE contract goals).

As part of the disparity study, BBC assessed whether there were any disparities between:

- The percentage of contracting dollars (including subcontract dollars) that minority- and woman-owned businesses received on construction; professional services; and goods and support services contracts that INDOT awarded between July 1, 2009 and June 30, 2013 (i.e., *utilization*);[1] and
- The percentage of construction; professional services; and goods and support services contracting dollars that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of INDOT prime contracts and subcontracts (i.e., *availability*).

The disparity study also examined other quantitative and qualitative information related to:

- The legal framework surrounding INDOT's compliance with the state's MBE/WBE Program and the Federal DBE Program;
- Local marketplace conditions for minority- and woman-owned businesses; and
- Contracting practices and business assistance programs that INDOT currently has in place.

INDOT could use information from the study to help refine its compliance with the state's MBE/WBE Program and its implementation of the Federal DBE Program including setting an overall goal for the participation of minority- and woman-owned businesses and DBEs in INDOT contracting; determining which program measures to use to encourage the participation of

[1] The study team considered businesses as minority- or woman-owned regardless of whether they were certified as MBE/WBEs through the Indiana Department of Administration or as DBEs through INDOT.

minority- and woman-owned businesses and DBEs; and, if appropriate, determining which groups would be eligible for race- and gender-conscious program measures.

BBC summarizes key information from the 2015-16 INDOT Disparity Study in four parts:

A. Analyses in the disparity study;

B. Utilization and disparity analysis results;

C. Overall DBE Goal; and

D. Program implementation.

A. Analyses in the Disparity Study

Along with measuring potential disparities between the participation and availability of minority- and woman-owned businesses in INDOT contracts, BBC also examined other quantitative and qualitative information related to INDOT's compliance with the state's MBE/WBE Program and its implementation of the Federal DBE Program:

- The study team conducted an analysis of federal regulations, case law, and other information to guide the methodology for the disparity study. The analysis included a review of federal, state, and local requirements related to minority- and woman-owned business programs including the Federal DBE Program (see Chapter 2 and Appendix B).
- BBC conducted quantitative analyses of the success of minorities, women, and minority- and woman-owned businesses throughout Indiana. In addition, the study team collected qualitative information about potential barriers that minority- and woman-owned businesses face in the local marketplace through in-depth interviews, telephone surveys, public meetings, and written testimony (see Chapter 3, Appendix D, and Appendix E).
- BBC analyzed the percentage of relevant INDOT contracting dollars that minority- and woman-owned businesses are available to perform. That analysis was based on telephone surveys that the study team completed with more than 1,350 Indiana businesses that work in industries related to the types of construction; professional services; and goods and support services contracts that INDOT awards (see Chapter 5 and Appendix C).
- BBC analyzed the dollars that minority- and woman-owned businesses received on more than 21,000 construction; professional services; and goods and support services prime contracts and subcontracts that INDOT awarded between July 1, 2009 and June 30, 2013 (i.e., the study period) (see Chapter 6).
- BBC examined whether there were any disparities between the participation and availability of minority- and woman-owned businesses on the construction; professional services; and goods and support services contracts that INDOT awarded during the study period (see Chapter 7 and Chapter 8).
- BBC provided INDOT with information from the availability analysis and other research that the agency might consider in setting its three-year overall DBE goal including the base figure and consideration of a "step-2" adjustment (see Chapter 9).

- BBC reviewed INDOT's current contracting practices and DBE and MBE/WBE program measures and provided guidance related to additional program options and refinements to those practices and measures (see Chapter 10 and Chapter 11).

B. Utilization and Disparity Analysis Results

INDOT currently uses DBE or MBE/WBE contract goals on many of the contracts that it awards. Prime contractors can meet contract goals by either making subcontracting commitments with certified DBE or MBE/WBE subcontractors at the time of bid or by showing that they made all reasonable good faith efforts to fulfill the goals but could not do so. Utilization and disparity analysis results, along with other pertinent information, are relevant to INDOT's determination of which groups could be eligible for any race- or gender-conscious measures. Courts have considered the existence of substantial disparities between utilization and availability for particular groups as inferences of discrimination in the local marketplace against those groups and as support for using race- and gender-conscious program measures. In addition, that information is useful for INDOT to examine the effectiveness of the measures that it is currently using to encourage the participation of minority- and woman-owned businesses.

Utilization results. The study team measured the participation of minority- and woman-owned businesses in terms of *utilization*—the percentage of prime contract and subcontract dollars that minority- and woman-owned businesses received on INDOT prime contracts and subcontracts during the study period. Figure ES-1 presents the overall percentage of contracting dollars that minority- and woman-owned businesses received on construction; professional services; and goods and support services contracts that INDOT awarded during the study period. The darker portion of the bar represents the percentage of contracting dollars that certified DBEs received during the study period. As shown in Figure ES-1, overall, minority- and woman-owned businesses received 11.6 percent of the relevant contracting dollars that INDOT awarded during the study period. The darker portion of the bar shows that the majority of those contracting dollars—6.4 percent—went to certified DBEs

Figure ES-1.
Participation of minority- and woman-owned businesses

Notes:

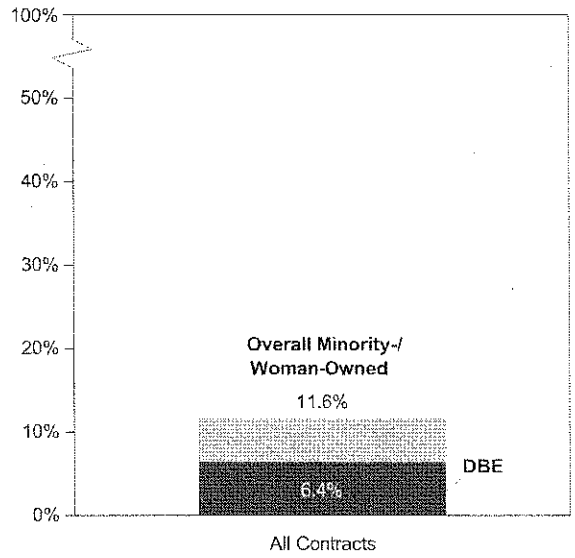
The study team analyzed 21,186 prime contracts and subcontracts.

The darker portion of the bar represents participation of certified DBEs.

For more detail, see Figure F-2 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.



Disparity analysis results. Although information about the participation of minority- and woman-owned businesses in INDOT contracts is instructive on its own, it is even more instructive when it is compared with the level of participation that might be expected based on the availability of minority- and woman-owned businesses for INDOT work. As part of the disparity analysis, BBC compared the participation of minority- and woman-owned businesses in INDOT prime contracts and subcontracts with the percentage of contract dollars that those businesses might be expected to receive based on their availability for that work. BBC expressed both participation and availability as percentages of the total dollars that a particular group received for a particular set of contracts. BBC then calculated a *disparity index* by dividing participation by availability and multiplying by 100.[2] A disparity index of 100 indicates an exact match between participation and availability for a particular group for a specific set of contracts (often referred to as *parity*). A disparity index of less than 100 may indicate a disparity between participation and availability, and disparities of less than 80 are described in this report as *substantial*.[3] Disparity analysis results for key contract sets are described below.

All contracts. Figure ES-2 presents disparity analysis results for all construction; professional services; and goods and services contracts that INDOT awarded during the study period. The line down the center of the graph shows a disparity index of 100, which indicates parity between participation and availability. For reference, a line is also drawn at a disparity index level of 80, because some courts use 80 as a threshold for what indicates a substantial disparity. As shown in Figure ES-2, overall, the participation of minority- and woman-owned businesses in contracts that INDOT awarded during the study period was largely in line with what one might expect based on the availability of those businesses for that work. The disparity index of 101 indicates that minority- and woman-owned businesses considered together received approximately $1.01 for every dollar that they might be expected to receive based on their availability for the prime contracts and subcontracts that INDOT awarded during the study period. However, a number of groups exhibited disparity indices below parity.

- Two groups exhibited disparity indices substantially below parity—Subcontinent Asian American-owned businesses (disparity index of 66) and Hispanic American-owned businesses (disparity index of 54).
- Two groups exhibited disparity indices below parity—Black American-owned businesses (disparity index of 87) and white woman-owned businesses (disparity index of 90)—but those disparities did not reach the threshold for what is considered substantial.
- Two groups did not exhibit disparity indices below parity—Asian Pacific American-owned businesses (disparity index of 200+) and Native American-owned businesses (disparity index of 200+).

---

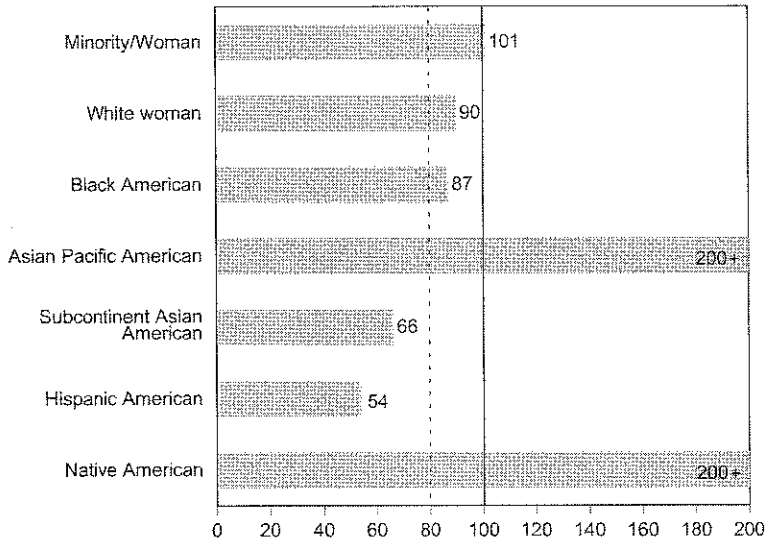
[2] For example, if actual participation of white woman-owned businesses on a set of contracts was 2 percent and the availability of white woman-owned businesses for those contracts was 10 percent, then the disparity index would be 2 percent divided by 10 percent, which would then be multiplied by 100 to equal 20.

[3] Several courts deem a disparity index below 80 as being "substantial" and have accepted it as evidence of adverse conditions for minority- and woman-owned businesses. For example, see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng'g Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994). See Appendix B for additional discussion of those and other cases.

Figure ES-2.
Disparity indices by group

Note:
The study team analyzed 21,186 prime contracts/subcontracts.
For more detail, see Figure F-2 in Appendix F.

Source:
BBC Research & Consulting disparity analysis.



INDOT applied DBE or MBE/WBE contract goals to most of the construction and professional services contracts that it awarded during the study period, so the disparity analysis results shown in Figure 7-3 are largely reflective of the use of those measures.

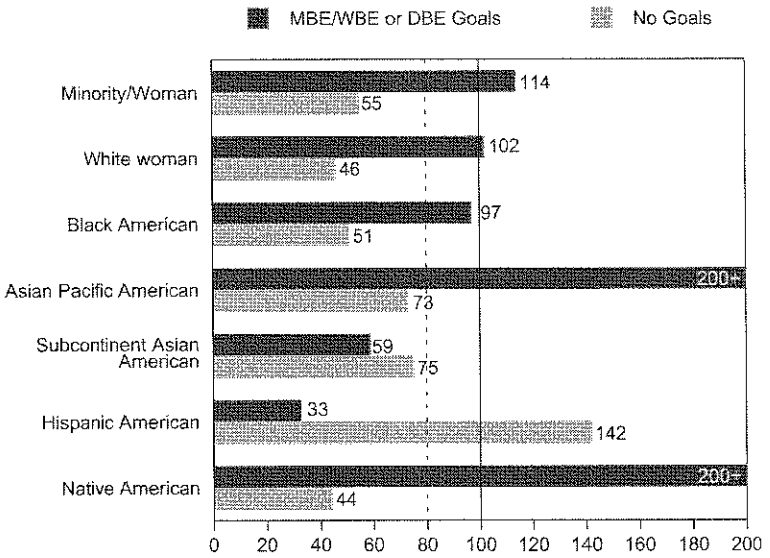
Goals and no-goals contracts. It is instructive to examine whether disparities exist for minority- or woman-owned businesses for contracts that INDOT awarded in a *race- and gender-neutral environment*—that is, for contracts to which neither DBE nor MBE/WBE contract goals applied. During the study period, INDOT did not apply DBE or MBE/WBE contract goals to many of the contracts that it awarded. Figure ES-3 presents disparity analysis results separately for contracts to which goals applied (*goals contracts*) and contracts to which goals did not apply (*no-goals contracts*).

Figure ES-3.
Disparity indices for goals contracts and no-goals contracts

Note:
The study team analyzed 13,567 goals contracts and 7,619 no-goals contracts.

For more detail, see Figures F-15 and F-16 in Appendix F.

Source:
BBC Research & Consulting disparity analysis.



As shown in Figure ES-3, minority- and woman-owned businesses considered together exhibited a substantial disparity on no-goals contracts (disparity index of 55) but did not exhibit a disparity on goals contracts (disparity index of 114). In addition, when examined separately, most groups exhibited substantial disparities on no-goals contracts:

- Black American-owned businesses (disparity index of 51), Asian Pacific American-owned businesses (disparity index of 73), Subcontinent Asian American-owned businesses (disparity index of 75), Native American-owned businesses (disparity index of 44), and white woman-owned businesses (disparity index of 46) showed substantial disparities on no-goals contracts. Hispanic American-owned businesses did not show a disparity on those contracts (disparity index of 142).
- Only Hispanic American-owned businesses showed a substantial disparity on goals contracts (disparity index of 33).

C. Overall DBE Goal

According to 49 Code of Federal Regulations (CFR) Part 26, an agency is required to develop and submit an overall goal for DBE participation. The goal must be based on demonstrable evidence of the availability of DBEs relative to the availability of all businesses to participate on the agency's USDOT-funded contracts. The agency must try to meet the goal using race- and gender-neutral means and, if necessary, race- and gender-conscious means (or a combination of both).[4] As specified in the Final Rule effective February 28, 2011, an agency is required to submit its overall DBE goal every three years.[5] However, the overall DBE goal is an *annual* goal in that an agency must monitor DBE participation in its USDOT-funded contracts every year. If DBE participation for a particular year is less than the overall DBE goal for that year, then the agency must analyze the reasons for the difference and establish specific measures that enable the agency to meet the goal in the next year.

INDOT must prepare and submit an overall DBE goal that is supported by information about the steps that it used to develop the goal. INDOT is required to next submit a goal for federal fiscal years (FFYs) 2017 through 2019. Federal regulations require INDOT to establish its overall DBE goal using a two-step process:

1. Determining a base figure; and
2. Considering a "step-2" adjustment.

Determining a base figure. Establishing a base figure is the first step in calculating an overall DBE goal for INDOT's Federal Highway Administration (FHWA)-funded contracts. BBC calculated the base figure by measuring the availability of *potential DBEs*—that is, minority- and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 CFR Part 26. BBC examined the availability of potential DBEs for FHWA-funded prime contracts and subcontracts that INDOT awarded during the study period. BBC's approach to calculating INDOT's base figure is consistent with relevant

[4] 49 CFR Sections 26.45, 26.51.

[5] http://www.gpo.gov/fdsys/pkg/FR-2011-01-28/html/2011-1531.htm

court decisions, federal regulations, and USDOT guidance. BBC's analysis indicates that the availability of potential DBEs for INDOT's FHWA-funded contracts is 10.9 percent. INDOT might consider 10.9 percent as the base figure for its overall goal for DBE participation.[6]

Considering a "step-2" adjustment. The Federal DBE Program requires that an agency consider a step-2 adjustment to its base figure as part of determining its overall DBE goal. Factors that an agency should assess in determining whether to make a step-2 adjustment include:

- Current capacity of DBEs to perform agency work as measured by the volume of work DBEs have performed in recent years;
- Information related to employment, self-employment, education, training, and unions;
- Any disparities in the ability of DBEs to get financing, bonding, and insurance; and
- Other relevant data.[7]

Based on information from the disparity study, there are several reasons why INDOT might consider adjusting the 10.9 percent base figure:

- INDOT might consider making an upward adjustment to its base figure to account for barriers that minorities, women, and minority- and woman-owned businesses face in the Indiana marketplace related to human capital, financial capital, business ownership, and business success (for details, see Chapter 3 and Appendices D and E). Such an adjustment would correspond to a "determination of the level of DBE participation you would expect absent the effects of discrimination."[8]
- INDOT might also consider a downward adjustment to its base figure based on the volume of work that DBEs have performed in recent years on its contracts. INDOT's utilization reports for FFYs 2010 through 2015 indicated median annual DBE participation of 8.9 percent for those years, which is lower than its base figure. (BBC's analyses showed DBE participation on INDOT contracts during the study period to be 6.4 percent.) USDOT's "Tips for Goal-Setting" suggests that an agency can make a step-2 adjustment by averaging the base figure with past median DBE participation.
- INDOT might also consider a downward adjustment to its base figure based on its analysis of the availability of DBE-certified businesses from its bidders list. INDOT's analysis indicated that 3.7 percent of its bidders list comprises DBE-certified businesses (weighted by the volume of contracts that INDOT awards in relevant industries). USDOT's "Tips for Goal-Setting" suggests that an agency should use such an approach when using data to inform goal-setting.

---

[6] INDOT should consider whether the types, sizes, and locations of FHWA-funded contracts that the agency anticipates awarding in the time period that the goal will cover will be similar to the types of FHWA-funded contracts that the agency awarded during the study period.

[7] 49 CFR Section 26.45.

[8] 49 CFR Section 26.45 (b).

USDOT "Tips for Goal-Setting" states that an agency is not required to make a step-2 adjustment to its base figure as long as it can explain what factors it considered and can explain its decision in its Goal and Methodology document.

D. Program Implementation

Chapter 11 reviews information relevant to INDOT's compliance with the state's MBE/WBE Program and its implementation of the Federal DBE Program. INDOT should review study results and other relevant information in connection with making decisions concerning both programs. Key areas of potential refinement are discussed below.

- INDOT should consider continuing its efforts to network with minority- and woman-owned businesses, but the agency might also consider broadening its efforts to include more partnerships with local trade organizations and other public agencies. INDOT might also consider creating a consortium of local organizations and public agencies that would jointly host quarterly outreach and networking events and training sessions for businesses seeking public sector contracts.
- To further encourage the participation of small businesses—including many minority- and woman-owned businesses—INDOT should consider making efforts to unbundle relatively large contracts into several smaller contracts. Doing so would result in that work being more accessible to small businesses, which in turn might increase opportunities for minority- and woman-owned businesses and result in greater minority- and woman-owned business participation.
- INDOT should consider exploring ways to increase prime contracting and subcontracting opportunities for small businesses including many minority- and woman-owned businesses. With regard to prime contract opportunities, INDOT might consider setting aside small prime contracts for small business bidding to encourage the participation of minority- and woman-owned businesses as prime contractors. With regard to subcontract opportunities, INDOT could consider implementing a program that requires prime contractors to include certain levels of subcontracting as part of their bids and proposals.
- Disparity analysis results indicated that most racial/ethnic and gender groups did not show disparities on contracts to which INDOT applied DBE or MBE/WBE contract goals during the study period. In contrast, most racial/ethnic and gender groups showed substantial disparities on contracts to which INDOT did not apply DBE or MBE/WBE contract goals. INDOT should consider continuing its use of DBE and MBE/WBE contract goals in the future. The agency will need to ensure that the use of those goals is narrowly tailored and consistent with other relevant legal standards (for details, see Chapter 2 and Appendix B).

As part of the disparity study, the study team also examined information concerning conditions in the local marketplace for minorities, women, and minority- and woman-owned businesses including results for different racial/ethnic and gender groups. INDOT should review the full disparity study report, as well as other information it may have, in determining whether it needs to use any race- or gender-conscious measures as part of its efforts to comply with the state's MBE/WBE Program and its implementation of the Federal DBE Program, and if so, what groups might be considered eligible to participate in such measures.

CHAPTER 1.
Introduction

The Indiana Department of Transportation (INDOT) is responsible for planning, building, maintaining, and operating the transportation and highway system throughout Indiana. As an Indiana state agency, INDOT complies with the State of Indiana's Minority and Women's Business Enterprises (MBE/WBE) Program. The MBE/WBE Program is designed to encourage the participation of minority- and woman-owned businesses in state contracting and to create a fair, competitive, and equitable environment for those businesses. In addition, INDOT implements the Federal Disadvantaged Business Enterprise (DBE) Program, because it receives funds from the United States Department of Transportation (USDOT). The Federal DBE Program is designed to address potential discrimination against DBEs in the award and administration of USDOT-funded contracts.

INDOT retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help evaluate the effectiveness of its efforts to comply with the state's MBE/WBE Program and its implementation of the Federal DBE Program in encouraging the participation of minority- and woman-owned businesses in state- and federally-funded contracts, respectively. A disparity study examines whether there are any disparities between:

- The percentage of contract dollars (including subcontract dollars) that an agency spent with minority- and woman-owned businesses during a particular time period (i.e., *utilization*); and
- The percentage of contract dollars that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of the agency's prime contracts and subcontracts (i.e., *availability*).

Disparity studies also examine other quantitative and qualitative information related to:

- The legal framework surrounding an agency's implementation of minority- and woman-owned business programs;
- Local marketplace conditions for minority- and woman-owned businesses; and
- Contracting practices and business assistance programs that the agency currently has in place.

There are several reasons why a disparity study is useful to an agency that implements minority- and woman-owned business programs and other disadvantaged or small business programs:

- The types of research that are conducted as part of a disparity study provide information that is useful to an agency that is implementing such programs (e.g., setting overall participation goals).
- A disparity study often provides insights into how to improve contracting opportunities for local small businesses including many minority- and woman-owned businesses.

- An independent, objective review of the participation of minority- and woman-owned businesses in an agency's contracting is valuable to agency leadership and to external groups that may be monitoring the agency's contracting practices.
- State and local agencies that have successfully defended implementations of such programs in court have typically relied on information from disparity studies.

BBC introduces the 2015-16 INDOT disparity study in three parts:

A. Background;

B. Study scope; and

C. Study team members.

A. Background

INDOT complies with the state's MBE/WBE Program and implements the Federal DBE Program. The disparity study includes information that is relevant to refining INDOT's implementations of both programs.

State's MBE/WBE Program. In 1982, the State of Indiana established the Governor's Commission on Minority and Women's Business Enterprises (the MBE/WBE Commission) to encourage the participation of minority- and woman-owned businesses in state contracting. The MBE/WBE Commission is responsible for overseeing the State of Indiana's MBE/WBE program.[1] The program comprises various measures to encourage minority- and woman-owned business participation. Some of those measures are *race- and gender-neutral* measures. Race- and gender-neutral measures are measures that are designed to encourage the participation of all businesses—or, all small businesses—in an entity's contracting. Participation in such measures is not limited to minority- and woman-owned businesses or to certified MBEs, WBEs, or DBEs. The state also allows—but does not necessarily require—state entities to use *race- and gender-conscious measures* as part of their compliance with the MBE/WBE program. Race- and gender-conscious measures are designed to specifically encourage the participation of minority- and woman-owned businesses in an entity's contracting (e.g., using MBE/WBE goals on individual contracts).

Setting overall goals for MBE/ WBE participation. Each year, the MBE/WBE Commission establishes overall annual goals for the participation of minority- and woman-owned businesses in state contracts. The goals apply to the participation of minority- and woman-owned businesses in both prime contracts and subcontracts. The Commission sets separate goals for construction; professional services; and goods and support services based on appropriate research. The MBE/WBE Commission may also establish separate subgoals for specific racial/ethnic and gender groups.[2] Annual MBE/WBE goals are aspirational—there is no requirement that individual state entities meet them. Failure to meet the goals does not automatically cause changes to how a particular entity complies with the MBE/WBE Program.

---

[1] The MBE/WBE Commission's primary responsibilities as well as elements and provisions of the State of Indiana's MBE/WBE Program are described in IC 4-13-16.5, IC 5-16-1-7 and Title 25 of Indiana Administrative Code (IAC), Article 5.

[2] 25 IAC 5-7-3.

Prime contract participation. The MBE/WBE Program calls for agencies to encourage the participation of minority- and woman-owned businesses as prime contractors in their contracting and procurement.[3] Specific program measures related to prime contract participation include:

- Outreach;
- Small business programs;
- Bonding training and assistance;
- Development of a bidders list;
- Coordination with small business assistance organizations; and
- Feedback to unsuccessful bidders.

There are no provisions in the MBE/WBE Program that give explicit preferences to minority- and woman-owned businesses over businesses owned by non-Hispanic white men (i.e., majority-owned businesses) when bidding as prime contractors on state-funded contracts.

Subcontract participation. As part of the MBE/WBE Program, state agencies may set goals for the participation of minority- and woman-owned businesses as subcontractors on individual contracts (i.e., MBE/WBE contract goals). Prime contractors bidding on contracts that include such goals must either meet the goals by making subcontracting commitments to minority- or-woman-owned businesses or by requesting "good faith efforts" waivers. The Indiana Department of Administration (IDOA) reviews waiver requests and will grant waivers if prime contractors demonstrate good faith efforts towards compliance with the goals.[4] If prime contractors do not meet the goals through subcontracting commitments or through approved waivers, then IDOA may reject prime contractors' bids.[5]

Federal DBE Program. The Federal DBE Program is a program designed to increase the participation of minority- and woman-owned businesses in USDOT-funded contracts. As a recipient of USDOT funds, INDOT must comply with federal regulations and implement the Federal DBE Program.

Setting an overall goal for DBE participation. As part of the Federal DBE Program, every three years, an agency is required to set an overall goal for DBE participation in its USDOT-funded contracts.[6] Although an agency is required to set the goal every three years, the overall DBE goal is an *annual* goal in that the agency must monitor DBE participation in its USDOT-funded contracts every year. If DBE participation for a particular year is less than the overall DBE goal for that year, then the agency must analyze the reasons for the difference and establish specific measures to address the difference and enable the agency to meet the goal in the next year.

---

[3] 25 IAC 5-5.

[4] 25 IAC 5-7-5.

[5] 25 IAC 5-7-6.

[6] http://www.gpo.gov/fdsys/pkg/FR-2011-01-28/html/2011-1531.htm

The Federal DBE Program describes the steps an agency must follow in establishing its overall DBE goal. To begin the goal-setting process, an agency must develop a base figure based on demonstrable evidence of the availability of DBEs to participate in the agency's USDOT-funded contracts. Then, after considering various, related factors, the agency can make an upward, downward, or no adjustment to its base figure as it determines its overall DBE goal (referred to as a "step-2" adjustment).

Projecting the portion of the overall DBE goal to be met through race- and gender-neutral means. According to 49 Code of Federal Regulations (CFR) Part 26, an agency must meet the maximum feasible portion of its overall goal for DBE participation through the use of race- and gender-neutral program measures (for examples of race- and gender-neutral measures, see 49 CFR Section 26.51(b)).[7] If an agency can meet its goal solely through the use of race- and gender-neutral measures, it cannot implement race- or gender-conscious measures as part of its program. Every three years, the Federal DBE Program requires an agency to project the portion of its overall DBE goal that it will meet through race- and gender- neutral measures and the portion that it will meet through any race-or gender-conscious measures. USDOT has outlined a number of factors for an agency to consider when making such determinations.[8]

Determining whether all groups will be eligible for race- or gender-conscious measures. If an agency determines that race- or gender-conscious measures—such as DBE contract goals—are appropriate for its implementation of the Federal DBE Program, then it must also determine which racial/ethnic or gender groups are eligible for participation in those measures. Eligibility for such measures is limited to only those racial/ethnic or gender groups for which compelling evidence of discrimination exists in the local marketplace. USDOT provides a waiver provision if an agency determines that its implementation of the Federal DBE Program should only include certain racial/ethnic or gender groups in the race- or gender-conscious measures that it uses.

B. Study Scope

Information from the disparity study will help INDOT continue to encourage the participation of minority- and woman-owned businesses in state-funded and federally-funded contracts. In addition, information from the study will help INDOT comply with the state's MBE/WBE Program and the Federal DBE Program in a legally-defensible manner.

Definitions of minority- and woman-owned businesses. To interpret the core analyses presented in the disparity study, it is useful to understand how the study team treats minority- and woman-owned businesses and businesses that are certified as MBE/WBEs with IDOA and as DBEs with INDOT. It is also important to understand how the study team treats businesses owned by minority women in its analyses.

Minority- and woman-owned businesses. The study team focused its analyses on the minority- and woman-owned business groups that the state's MBE/WBE Program and the Federal DBE Program presume to be disadvantaged: Black American-, Asian Pacific American-, Subcontinent Asian American-, Hispanic American-, Native American-, and non-Hispanic white woman-owned

---

[7] 49 CFR Section 26.51.

[8] http://www.dotcr.ost.dot.gov/Documents/Dbe/49CFRPART26.doc

businesses. Note, however, that although the state's MBE/WBE Program treats all Asian American-owned businesses together, the Federal DBE Program makes a distinction between Asian Pacific American-owned businesses and Subcontinent Asian American-owned businesses. BBC makes a distinction between Asian Pacific American-owned businesses and Subcontinent Asian American-owned businesses in core disparity study analyses, consistent with the Federal DBE Program.

The study team analyzed the possibility that race- or gender-based discrimination affected the participation of minority- and woman-owned businesses in INDOT work based specifically on the race/ethnicity and gender of business ownership. Therefore, the study team counted businesses as minority- or woman-owned regardless of whether they were, or could be, certified as MBEs or WBEs through IDOA or as DBEs through INDOT. Analyzing the participation and availability of minority- and woman-owned businesses regardless of MBE/WBE/DBE certification allowed the study team to assess whether there are disparities affecting all minority- and woman-owned businesses and not just certified businesses.

MBE/WBEs. MBE/WBEs are minority- and woman-owned businesses that are specifically certified as such through IDOA. Businesses seeking MBE/WBE certification with the State of Indiana are required to submit an application to IDOA's MBE/WBE Division. The application is available online and requires businesses to submit various information including business name; contact information; tax information; work specializations; and race/ethnicity and gender of the owners. The MBE/WBE Division reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required business information. Note that unlike many other minority- and woman-owned business programs—such as the Federal DBE Program—no revenue or net worth assessments are associated with IDOA's MBE/WBE certification process.

DBEs. DBEs are minority- and woman-owned businesses that are specifically certified as such through INDOT. A determination of DBE eligibility includes assessing businesses' gross revenues and business owners' personal net worth (maximum of $1.32 million excluding equity in a home and in the business). Some minority- and woman-owned businesses do not qualify as DBEs because of gross revenue or net worth requirements. Businesses owned by non-Hispanic white men can be certified as DBEs if those businesses meet the requirements in 49 CFR Part 26.

Businesses seeking DBE certification in Indiana are required to submit an application to INDOT. The application is available online and requires businesses to submit various information including business name; contact information; tax information; work specializations; and race/ethnicity and gender of the owners. INDOT reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required business information.

Because the Federal DBE Program requires agencies to track the participation of certified DBEs, BBC reports utilization results for all minority- and woman-owned businesses and separately for those minority- and woman-owned businesses that are certified as DBEs. However, BBC does not report availability or disparity analysis results separately for certified DBEs.

Potential DBEs. Potential DBEs are minority- and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 CFR Part 26 (regardless of actual certification). The study team did not count businesses that have been decertified or have graduated from the DBE Program as potential DBEs in this study. BBC examined the availability of potential DBEs as part of helping INDOT calculate the base figure of its overall DBE goal. Figure 1-1 provides further explanation of BBC's definition of potential DBEs.

Figure 1-1.
Definition of potential DBEs

To help INDOT calculate its overall DBE goal, BBC did not include the following types of minority- and woman-owned businesses in its definition of potential DBEs:

- Minority- and woman-owned businesses that have graduated from the DBE Program and have not been recertified;
- Minority- and woman-owned businesses that are not currently DBE-certified but that have applied for DBE certification with INDOT and have been denied; and
- Minority- and woman-owned businesses that are not currently DBE-certified that appear to have average annual revenues over the most recent three years so high as to deem them ineligible for DBE certification.

At the time of this study, the overall revenue limit for DBE certification was $22,410,000 based on a three-year average of gross receipts. There were lower revenue limits for specific subindustries according to the U.S. Small Business Administration (SBA) small business size standards. Only a few minority- and woman-owned businesses appeared to have exceeded those revenue limits based on information that they provided as part of availability surveys. The revenue categories that the study team used to classify firms reflect recent changes to the Table of Small Business Size Standards published by the SBA.

Business owners must also meet USDOT personal net worth limits for their businesses to qualify for DBE certification. The personal net worth of business owners was not available as part of this study and thus was not considered when determining potential DBE status.

Minority woman-owned businesses. BBC considered four options when considering how to classify businesses owned by minority women:

- Classifying those businesses as both minority-owned and woman-owned;
- Creating unique groups of minority woman-owned businesses;
- Classifying minority woman-owned businesses with all other woman-owned businesses; and
- Classifying minority woman-owned businesses with their corresponding minority groups.

BBC chose not to code businesses as both woman-owned and minority-owned to avoid double-counting certain businesses when reporting disparity study results. Creating groups of minority woman-owned businesses that were distinct from businesses owned by minority men (e.g., Black American woman-owned businesses versus businesses owned by Black American men) was also unworkable because some minority groups exhibited such low participation that further disaggregation by gender would have made it even more difficult to interpret the results.

After rejecting the first two options, BBC then considered whether to group minority woman-owned businesses with all other woman-owned businesses or with their corresponding minority groups. BBC chose the latter (e.g., grouping Black American woman-owned businesses with all other Black American-owned businesses). Thus, *woman-owned businesses* in this report refers to non-Hispanic white woman-owned businesses.

Majority-owned businesses. Majority-owned businesses are businesses that are not owned by minorities or women (i.e., businesses owned by non-Hispanic white men). In core disparity study analyses, the study team coded each business as minority-, woman-, or majority-owned.

Analyses in the disparity study. The disparity study examined whether there are any disparities between the participation and availability of minority- and woman-owned businesses on INDOT contracts. The study focused on construction; professional services; and goods and support services contracts that INDOT awarded between July 1, 2009 and June 30, 2013 (i.e., the study period). During the study period, INDOT applied MBE/WBE contract goals to many state-funded contracts and DBE goals to many federally-funded contracts.

In addition to the core utilization, availability, and disparity analyses, the disparity study also includes:

- A review of legal issues surrounding the compliance with the state's MBE/WBE Program and implementation of the Federal DBE Program;
- An analysis of local marketplace conditions for minority- and woman-owned businesses;
- An assessment of INDOT's contracting practices and business assistance programs; and
- Other information for INDOT to consider as it refines its compliance with the state's MBE/WBE Program and the Federal DBE Program.

That information is organized in the disparity study report in the following manner:

Legal framework and analysis. The study team conducted a detailed analysis of relevant federal regulations, case law, state law, and other information to guide the methodology for the disparity study. The analysis included a review of federal and state requirements concerning the compliance with the state's MBE/WBE Program and the implementation of the Federal DBE Program. The legal framework and analysis for the study is summarized in **Chapter 2** and presented in detail in **Appendix B**.

Marketplace conditions. BBC conducted quantitative analyses of the success of minorities and women and minority- and woman-owned businesses in the local contracting industries. BBC compared business outcomes for minorities, women, and minority- and woman-owned businesses to outcomes for non-Hispanic white men and majority-owned businesses. In addition, the study team collected qualitative information about potential barriers that small businesses and minority- and woman-owned businesses face in Indiana through in-depth interviews. Information about marketplace conditions is presented in **Chapter 3, Appendix D,** and **Appendix E.**

Data collection and analysis. BBC examined data from multiple sources to complete the utilization and availability analyses. In addition, the study team conducted telephone surveys with thousands of businesses throughout Indiana. The scope of the study team's data collection and analysis as it pertains to the utilization and availability analyses is presented in **Chapter 4**.

Availability analysis. BBC analyzed the percentage of minority- and woman-owned businesses that are *ready, willing, and able* to perform on INDOT prime contracts and subcontracts. That analysis was based on INDOT data and telephone surveys that the study team conducted with

thousands of Indiana businesses that work in industries related to the types of contracting dollars that INDOT awards. BBC analyzed availability separately for businesses owned by specific minority groups and women and for different types of contracts. Results from the availability analysis are presented in **Chapter 5** and **Appendix C**.

Utilization analysis. BBC analyzed contract dollars that INDOT spent with minority- and woman-owned businesses on contracts that the agency awarded between July 1, 2009 and June 30, 2013. Those data included information about associated subcontracts.[9] Note that INDOT applied MBE/WBE and DBE contract goals to many of those contracts. BBC analyzed utilization separately for businesses owned by specific minority groups and women and for different types of contracts. Results from the utilization analysis are presented in **Chapter 6**.

Disparity analysis. BBC examined whether there were any disparities between the utilization of minority- and woman-owned businesses on contracts that INDOT awarded during the study period and the availability of those businesses for that work. BBC analyzed disparity analysis results separately for businesses owned by specific minority groups and women and for different types of contracts. The study team also assessed whether any observed disparities were statistically significant. Results from the disparity analysis are presented in **Chapter 7** and **Appendix F.**

Further exploration of disparities. BBC explored additional disparities between the utilization and availability of minority- and woman-owned businesses on contracts that INDOT awarded during the study period. Those analyses included comparisons of results for subsets of INDOT contracts and examinations of bids and proposals for a representative sample of contracts. BBC presents the results of those analyses in **Chapter 8**.

Overall DBE goal. Based on information from the availability analysis and other research, BBC provided INDOT with information that will help the agency set its overall DBE goal including the base figure and consideration of a step-2 adjustment. Information about INDOT's overall DBE goal is presented in **Chapter 9**.

Race- and gender-neutral measures. BBC reviewed information regarding evidence of discrimination in the Indiana contracting marketplace; analyzed INDOT's experience with meeting its overall MBE/WBE and DBE goals in the past; and provided information about INDOT's past performance in encouraging the participation of minority- and woman-owned businesses using race- and gender-neutral measures. Information from those analyses is presented in **Chapter 10**.

Federal DBE Program. BBC reviewed INDOT's implementation of the Federal DBE Program. BBC provided guidance related to additional program options. The study team's review and guidance is presented in **Chapter 11.**

---

[9] Note that prime contractors—not INDOT—actually *award* subcontracts to subcontractors. However, for simplicity, throughout the report, BBC refers to INDOT as *awarding* subcontracts.

Program implementation. BBC reviewed INDOT's contracting practices and DBE and MBE/WBE Program measures. BBC provided guidance related to considerations that INDOT could make to refine its implementation of the Federal DBE Program and compliance with the state's MBE/WBE Program. Those considerations are presented in **Chapter 12**.

C. Study Team Members

The BBC study team was made up of eight firms that, collectively, possess decades of experience related to conducting disparity studies in connection with the Federal DBE Program and state and local MBE/WBE programs.

BBC (prime consultant). BBC is a Denver-based disparity study and economic research firm. BBC had overall responsibility for the study and performed all of the quantitative analyses.

Bingle Research Group (BRG). BRG is a veteran-owned professional services firm based in Indianapolis, Indiana. BRG conducted in-depth interviews with Indiana businesses as part of the study team's qualitative analyses of marketplace conditions.

Briljent. Briljent is a woman-owned professional services firm based in Indianapolis, Indiana. Briljent conducted in-depth interviews with Indiana businesses as part of the study team's qualitative analyses of marketplace conditions.

Engaging Solutions. Engaging Solutions is a Black American woman-owned survey fieldwork firm based in Indianapolis, Indiana. Engaging Solutions conducted telephone surveys with thousands of Indiana businesses to gather information for the utilization and availability analyses.

ENTAP. ENTAP is a Black American-owned information technology firm based in Indianapolis, Indiana. ENTAP conducted various data processing tasks related to the utilization and availability analyses.

Gonzalez, Saggio, & Harlan (GSH). GSH is a minority-owned law firm with offices throughout the country. GSH provided guidance throughout the course of the study.

Holland & Knight. Holland & Knight is a law firm with offices throughout the country. Holland & Knight conducted the legal analysis that provided the basis for this study.

Keen Independent Research (Keen Independent). Keen Independent is a Denver-based research firm. Keen Independent helped manage the in-depth interview process as part of the study team's qualitative analyses of marketplace conditions.

CHAPTER 2.
Legal Framework

As an Indiana state agency, the Indiana Department of Transportation (INDOT) complies with the State of Indiana's Minority and Women's Business Enterprises (MBE/WBE) Program. The MBE/WBE Program is governed by Indiana Code (IC) 4-13-16.5 and 25 Indiana Administrative Code, Article 5 (25 IAC 5). In addition, as a United States Department of Transportation (USDOT) fund recipient, INDOT implements the Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program is governed by 49 Code of Federal Regulations (CFR) Part 26 and related federal regulations.

BBC Research & Consulting (BBC) presents the Legal Framework for the 2015-16 INDOT Disparity Study in three parts:

A. State of Indiana MBE/WBE Program;

B. Federal DBE Program; and

C. Legal standards.

A. State of Indiana MBE/WBE Program

The State of Indiana's MBE/WBE Program is designed to encourage the participation of minority- and woman-owned businesses in state contracting and to create a fair, competitive, and equitable environment for those businesses. The program comprises various measures to encourage the participation of minority- and woman-owned businesses in state contracting. Some of those measures are *race- and gender-neutral* measures, which are designed to encourage the participation of all businesses—or, all small businesses—in an entity's contracting. Participation in such measures is not limited to minority- and woman-owned businesses or to certified MBEs, WBEs, or DBEs. The state also allows—but does not necessarily require—state entities to use *race- and gender-conscious* measures as part of their compliance with the MBE/WBE program. Race- and gender-conscious measures are designed to specifically encourage the participation of minority- and woman-owned businesses in an entity's contracting (e.g., using MBE/WBE goals on individual contracts).

Each year, the Governor's Commission on Minority and Women's Business Enterprises (the MBE/WBE Commission) establishes overall annual goals for the participation of minority- and woman-owned businesses in state-funded prime contracts and subcontracts.[1] The MBE/WBE Commission sets separate goals for construction; professional services; and goods and support services based on appropriate research, which the state is required to conduct every five years.[2]

---

[1] BBC considers a contract as state-funded if it is funded solely through state or local sources.

[2] The MBE/WBE Commission's primary responsibilities as well as elements and provisions of the State of Indiana's MBE/WBE Program are described in IC 4-13-16.5, IC 5-16-1-7 and 25 IAC 5.

Figure 2-1 presents the current annual goals that the MBE/WBE Commission has set for each relevant contracting area.

Figure 2-1.
Overall Annual MBE/WBE Goals

Source: www.in.gov/idoa/mwbe/2494.htm

Contracting Area	Business Type	
	MBE	WBE
Construction	7 %	5 %
Professional services	8 %	8 %
Goods and support services	4 %	9 %

Definitions of MBE and WBE. According to 25 IAC 5, an MBE is defined as a business that is owned and controlled by U.S. citizens who identify with one of the following minority groups—Asian Americans, Black Americans, Hispanic Americans, Native Americans, or other minority groups. A WBE is a business that is owned and controlled by U.S. citizens who are women. Businesses that meet those requirements are eligible to become certified MBE/WBEs with the State of Indiana.

Certification requirements. Businesses seeking MBE/WBE certification with the State of Indiana are required to submit an application to the Indiana Department of Administration's (IDOA's) MBE/WBE Division. The application is available online and requires businesses to submit various information including business name; contact information; tax information; work specializations; and race/ethnicity and gender of the owners. The MBE/WBE Division reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required business information. Note that unlike many other minority- and woman-owned business programs—such as the Federal DBE Program—no revenue or net worth assessments are associated with IDOA's MBE/WBE certification process.

Reciprocity. The MBE/WBE Division has reciprocity agreements with other certifying organizations in the State of Indiana. If a minority- or woman-owned business is certified through one of those other agencies and has submitted required reciprocity forms, the MBE/WBE Division will recognize it as being MBE/WBE certified with the State of Indiana. (However, the MBE/WBE Division still has the authority to deny MBE/WBE certification to businesses even if they are certified with other organizations.) Organizations with which the MBE/WBE Division has reciprocity agreements include:

- INDOT, which is Indiana's only DBE-certifying organization;
- City of Indianapolis, which certifies both MBEs and WBEs; and
- The Mid-States Minority Supplier Development Council, which certifies only MBEs.

Measures to encourage MBE/WBE participation. As part of the State of Indiana's MBE/WBE Program, state entities are required to comply with measures to encourage the participation of minority- and woman-owned businesses in state contracting and procurement. Those measures include:

Outreach, promotion, and assessment;

- Monitoring and reporting of MBE/WBE participation; and
- MBE/WBE contract goals (potentially).

Outreach, promotion, and assessment. Administrative code requires state entities to engage in outreach activities with minority- and woman-owned businesses and also assess where and when those programs would be most useful. In addition, state entities are expected to provide and promote opportunities for certified MBE/WBEs to participate in contracting opportunities as prime contractors and as subcontractors.

Monitoring and reporting. State entities are required to monitor and report the participation of certified MBE/WBEs in state prime contracts and subcontracts.

Monitoring. Monitoring MBE/WBE participation requires state entities to engage in various activities, such as:

- Keeping track of certified MBE/WBEs that bid on state-funded entity contracts as prime contractors and develop strategies to increase the number of certified MBE/WBE bidders;
- Developing a standardized method of debriefing bidders who do not win state-funded entity contracts and counsel unsuccessful bidders on how to make future bids or proposals more competitive; and
- Hosting pre-project meetings with prime contractors and subcontractors during which subcontractors can learn when their services are likely to be needed and understand state law in connection with the prime contractor-subcontractor relationship.

Reporting. State law requires state entities to submit quarterly reports to the MBE/WBE Division regarding the participation of certified MBE/WBEs in state-funded prime contracts and subcontracts. In addition to total prime contract and subcontract dollars, state entities are required to report contact information for certified MBE/WBE subcontractors.

MBE/WBE contract goals. With approval from the MBE/WBE Commission, state entities may—but are not necessarily required to—use MBE/WBE contract goals on individual state-funded contracts to encourage the participation of minority- and woman-owned businesses. MBE/WBE contract goals may vary from contract to contract. However, across all contracts in a particular year, their use is intended to help state entities meet the overall annual goals that the MBE/WBE Commission sets.

Use of MBE/WBE contract goals. INDOT currently uses MBE/WBE contract goals on its state-funded construction and professional services contracts. INDOT applies the same goals to each of its contracts in a particular industry, and those goals are the same as the overall annual goals that the MBE/WBE Commission has set for relevant contracting areas (see Figure 2-1).

Meeting MBE/WBE contract goals. Prime contractors can meet MBE/WBE contract goals by either making subcontracting commitments with certified MBE/WBE subcontractors at the time

of bid or by showing that they made all reasonable good faith efforts to fulfill the goals but could not do so. Good faith efforts include:

- Direct contact or negotiations with certified MBE/WBE subcontractors;
- Advertising subcontracting opportunities for certified MBE/WBE subcontractors; and
- Sending notifications or solicitations to certified MBE/WBE subcontractors regarding subcontracting opportunities.

If prime contractors fail to meet MBE/WBE contract goals through subcontracting commitments or fail to fulfill good faith efforts, the MBE/WBE Division may deem their bids unresponsive and may reject them.

B. Federal DBE Program

The Federal DBE Program is designed to encourage the participation of minority- and woman-owned businesses in an agency's contracting, and more specifically, in its USDOT-funded contracts.[3] As part of the Federal DBE Program, every three years, an agency is required to set an overall goal for DBE participation in its USDOT-funded contracts.[4] Although an agency is required to set the goal every three years, the overall DBE goal is an *annual* goal in that the agency must monitor DBE participation in its USDOT-funded contracts every year. If DBE participation for a particular year is less than the overall DBE goal for that year, then the agency must analyze the reasons for the difference and establish specific measures to address the difference and enable the agency to meet the goal in the next year.

Definition of DBE. According to 49 CFR Part 26, a DBE is a business that is owned and controlled by one or more individuals who are socially and economically disadvantaged according to the guidelines in the Federal DBE Program. The following groups are presumed to be socially and economically disadvantaged according to the Federal DBE Program:

- Asian Pacific Americans;
- Black Americans;
- Hispanic Americans;
- Native Americans;
- Subcontinent Asian Americans; and
- Women of any race or ethnicity.

A determination of economic disadvantage also includes assessing businesses' gross revenues and business owners' personal net worth (maximum of $1.32 million excluding equity in a home and in the business). Some minority- and woman-owned businesses do not qualify as DBEs

[3] BBC considers a contract as USDOT-funded if it includes at least one dollar of USDOT funding.

[4] http://www.gpo.gov/fdsys/pkg/FR-2011-01-28/html/2011-1531.htm

because of gross revenue or net worth requirements. Businesses owned by non-Hispanic white men can be certified as DBEs if those businesses meet the requirements in 49 CFR Part 26.

Certification requirements. Businesses seeking DBE certification in Indiana are required to submit an application to INDOT. The application is available online and requires businesses to submit various information including business name; contact information; tax information; work specializations; and race/ethnicity and gender of the owners. INDOT reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required business information.

Measures to encourage DBE participation. Regulations that govern an agency's implementation of the Federal DBE Program require that the agency meets the maximum feasible portion of its overall DBE goal through the use of race- and gender-neutral measures.[5] If an agency cannot meet its overall DBE goal solely through race- and gender-neutral means, then it is permitted to use race- and gender-conscious measures—such as using DBE contract goals on individual USDOT-funded contracts—as part of its implementation of the Federal DBE Program. Prime contractors can meet DBE contract goals by either making subcontracting commitments with certified DBE subcontractors at the time of bid or by showing that they made all reasonable good faith efforts to meet the goals but could not do so.

Given that context, there are several approaches that government agencies could use to implement the Federal DBE Program.

1. Using a combination of race- and gender-neutral and race- and gender-conscious measures with all certified DBEs considered eligible. Many agencies use a combination of race- and gender-neutral and race- and gender-conscious measures when implementing the Federal DBE Program, with all certified DBEs being considered eligible to participate in the race- and gender-conscious measures. Those agencies use various measures that are designed to encourage the participation of small and emerging businesses in its contracting. In addition, they also use DBE contract goals on individual contracts, and the participation of all certified DBEs—regardless of race/ethnicity or gender—count toward meeting those goals.

INDOT implements the Federal DBE Program in this manner. The agency uses a combination of race- and gender-neutral and race- and gender-conscious measures and considers all certified DBEs as eligible to participate in race- and gender-conscious measures.

2. Applying a combination of race- and gender-neutral and race- and gender-conscious measures with only certain groups of certified DBEs considered eligible. Some agencies limit DBE participation in race- and gender-conscious measures to certain racial/ethnic or gender groups based on evidence of those groups facing discrimination within the agencies' respective relevant geographic market areas (*underutilized DBEs,* or *UDBEs*). For example, the California Department of Transportation (Caltrans) sets DBE contract goals for which only UDBEs—which does not include all DBE groups—are considered eligible. Caltrans counts the participation of all DBEs toward meeting its overall DBE goal, but only UDBE participation counts toward prime

[5] 49 CFR Section 26.51.

contractors meeting DBE contract goals on individual contracts. Caltrans determined which DBE groups were UDBEs in large part by examining results of disparity study results for individual racial/ethnic and gender groups. The Colorado Department of Transportation and the Oregon Department of Transportation, among other agencies, have implemented the Federal DBE Program in similar ways.

3. Applying a combination of race- and gender-neutral and more aggressive race- and gender-conscious measures in extreme circumstances. The Federal DBE Program provides that a recipient may not use more aggressive race- and gender-conscious program measures—such as setting aside contracts exclusively for DBE bidding—except in limited and extreme circumstances. An agency may only use set asides when no other method could be reasonably expected to redress egregious instances of discrimination.[6] However, specific quotas for DBE participation are strictly prohibited under the Federal DBE Program.

4. Operating an entirely race- and gender-neutral program. Some agencies have implemented the Federal DBE Program without the use of DBE contract goals or other race- and gender-conscious measures. Instead, those agencies only use race- and gender-neutral measures as part of their implementations of the Federal DBE Program. For example, the Florida Department of Transportation and the Port of Seattle implement the Federal DBE Program using only race- and gender-neutral program measures.

C. Legal Standards

INDOT's use of MBE/WBE and DBE contract goals on certain contracts is considered to be race- and gender-conscious. The U.S. Supreme Court has established that government programs that include race- and gender-conscious measures must meet the *strict scrutiny* standard of constitutional review.[7] The two key U.S. Supreme Court cases that established the strict scrutiny standard for such measures are:

- The 1989 decision in *City of Richmond v. J.A. Croson Company*, which established the strict scrutiny standard of review for race-conscious programs adopted by state and local governments;[8] and
- The 1995 decision in *Adarand Constructors, Inc. v. Peña*, which established the strict scrutiny standard of review for federal race-conscious programs.[9]

The strict scrutiny standard is extremely difficult for a governmental entity to meet. It presents the highest threshold for evaluating the legality of race- and gender-conscious measures short of prohibiting them altogether. Under the strict scrutiny standard, a governmental entity must:

---

[6] 49 CFR Section 26.43.

[7] Certain Federal Courts of Appeals apply the *intermediate scrutiny* standard to gender-conscious programs. Appendix B describes the intermediate scrutiny standard in detail.

[8] *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

[9] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

- Have a *compelling governmental interest* in remedying past identified discrimination or its present effects; and
- Establish that the use of any such measure is *narrowly tailored* to achieve the goal of remedying the identified discrimination.

A governmental entity must meet both the compelling governmental interest and the narrow tailoring components of the strict scrutiny standard. A program that fails to meet either component is unconstitutional.

Compelling governmental interest. A governmental entity must demonstrate a *compelling governmental interest* in remedying past identified discrimination in order to implement race- or gender-conscious measures. A governmental entity that uses race- or gender-conscious measures as part of a minority- or woman-owned business program has the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. State and local governments cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions. Rather, they must assess discrimination within their own relevant market areas.[10]

In *City of Richmond v. J.A. Croson Company*, the U.S. Supreme Court held that, "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." Lower court decisions since *City of Richmond v. J.A. Croson Company* have held that a compelling governmental interest must be established for each racial/ethnic and gender group to which race- and gender-conscious measures apply. Note that it is not necessary for a governmental entity itself to have discriminated against minority- or woman-owned businesses for it to act. In *City of Richmond v. J.A. Croson Company*, the Supreme Court found, "if [the governmental entity] could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry ... [i]t could take affirmative steps to dismantle such a system."

Several minority- and woman-owned business programs that have used race- and gender-conscious measures have been challenged in court and have been found to be unconstitutional, because the evidence that the governmental entity produced was not sufficient to show a compelling governmental interest. For discussion of those and other cases, see Appendix B.

Narrow tailoring. In addition to demonstrating a compelling governmental interest, a governmental entity must also demonstrate that its use of race- and gender-conscious measures is *narrowly tailored*. There are a number of factors that a court considers when determining whether the use of such measures is narrowly tailored, including:

- The necessity of such measures and the efficacy of alternative, race- and gender-neutral measures;

[10] *See e.g.*, Concrete Works, Inc. v. City and County of Denver ("Concrete Works I"), 36 F.3d 1513, 1520 (10th Cir. 1994).

- The degree to which the use of such measures is limited to those groups that actually suffer discrimination in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration, including the availability of waivers and sunset provisions;
- The relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.[11]

Several minority- and woman-owned business programs that have used race- and gender-conscious measures have been challenged in court and have been found to be unconstitutional, because the evidence that the governmental entity produced was not sufficient to meet the narrow tailoring requirement. For discussion of those and other cases, see Appendix B.

Meeting the strict scrutiny standard. Many programs have failed to meet the strict scrutiny standard, because they have failed to meet the compelling governmental interest requirement, the narrow tailoring requirement, or both. However, many other programs have met the strict scrutiny standard and courts have deemed them to be constitutional. Appendix B provides detailed discussions of those cases as well.

[11] *See, e.g., AGC, SDC v. Caltrans,* 713 F.3d at 1198-1199; *Rothe,* 545 F.3d at 1036; *Western States Paving,* 407 F3d at 993-995; *Sherbrooke Turf,* 345 F.3d at 971; *Adarand VII,* 228 F.3d at 1181; *Eng'g Contractors Ass'n,* 122 F.3d at 927 (internal quotations and citations omitted).

CHAPTER 3.
Marketplace Conditions

Federal Courts and the United States Congress have considered any barriers that minorities, women, and minority- and woman-owned businesses face in a local marketplace as evidence for the existence of race- and gender-based discrimination in that marketplace.[1,2,3] The United States Supreme Court and other federal courts have held that analyses of conditions in a local marketplace for minorities, women, and minority- and woman-owned businesses are instructive in determining whether entities' implementations of minority- and woman-owned business programs are appropriate and justified. Those analyses help entities determine whether they are *passively participating* in any race- or gender-based discrimination that makes it more difficult for minority- and woman-owned businesses to successfully compete for their contracts. Passive participation means that entities unintentionally perpetuate race- or gender-based discrimination simply by operating within discriminatory marketplaces. Many courts have held that passive participation in any race- or gender-based discrimination establishes a *compelling governmental interest* for entities to take remedial action to address such discrimination.[4,5,6]

BBC Research & Consulting (BBC) conducted quantitative and qualitative analyses to assess whether minorities, women, and minority- and woman-owned businesses face any barriers in the Indiana construction; professional services; and goods and support services industries. BBC also examined potential effects that any such barriers have on the participation of minority- and woman-owned businesses in contracts that government entities award. BBC examined local marketplace conditions primarily in four areas:

- **Human capital**, to assess whether minorities and women face any barriers related to education, employment, and gaining managerial experience in relevant industries;
- **Financial capital**, to assess whether minorities and women face any barriers related to wages, homeownership, personal wealth, and access to financing;
- **Business ownership** to assess whether minorities and women own businesses at rates that are comparable to that of non-Hispanic white men; and
- **Success of businesses** to assess whether minority- and woman-owned businesses have outcomes that are similar to those of businesses owned by non-Hispanic white men.

Chapter 3 summarizes information about barriers that minorities, women, and minority- and woman-owned businesses face in Indiana and nationwide as well as the historical context for those barriers. Additional quantitative and qualitative analyses of marketplace conditions are presented in Appendix D and Appendix E, respectively. Chapter 3 is organized in six parts:

A. Historical barriers;

B. Human capital;

C. Financial capital;

D. Business ownership;

E. Business success; and

F. Summary.

A. Historical Barriers

Historically, there have been myriad obstacles that have impeded minorities and women from starting and operating successful businesses. Barriers such as slavery, racial oppression, segregation, racial displacement, and labor discrimination produced substantial disparities for minorities and women, the effects of which are still apparent today. Those barriers limited opportunities for minorities in terms of both education and workplace experience.[7,8,9,10] Similarly, many women were limited to either being homemakers or taking gender-specific jobs with low pay and little chance for advancement.[11] Minorities and women in Indiana faced similar barriers. In the 19th and early 20th centuries, Indiana had 18 counties in which it was illegal for Black Americans to appear after dark.[12] In addition, during that time period, the Indiana Ku Klux Klan had a chapter in each county and had more than 150,000 members.[13] Disparate treatment of minorities and women also extended into the labor market. For example, BBC analyses of 1930 census data indicate that only 14 percent of women were in the labor market in Indiana.

In the middle of the 20th century, many legal and workplace reforms opened up new opportunities for minorities and women. *Brown V. Board of Education, The Equal Pay Act, The Civil Rights Act,* and *The Women's Educational Equity Act* outlawed many forms of race- and gender-based discrimination. Workplaces adopted formalized personnel policies and implemented programs to diversify their staffs.[14] Those reforms increased diversity in workplaces and reduced—but did not eliminate—educational and employment disparities for minorities and women[15,16,17,18] Minorities and women continue to face barriers—such as incarceration, residential segregation, and family responsibilities—that have made it more difficult to acquire the human and financial capital necessary to start businesses.

Incarceration. Nationwide, minorities are far more likely to be incarcerated than non-Hispanic whites. For example, approximately one quarter of Black American men and one sixth of Hispanic American men will be incarcerated during their lifetimes.[19] Incarceration rates for minorities in Indiana are similar to those for minorities nationwide. For example, Black Americans represent 9 percent of Indiana's total population but 34 percent of the state's incarcerated population.[20] Incarceration and felony convictions are associated with a number of labor difficulties including difficulties findings jobs and slow wage growth.[21,22] Because minorities exhibit such high incarceration rates, associated labor-related barriers affect them to a greater degree than non-Hispanic whites.

Residential segregation. Residential segregation remains a problem for minorities nationwide. Minorities are more likely to live in poor, racially homogenous neighborhoods with few jobs and inferior schools.[23,24] Indiana has the ninth highest level of residential segregation in the nation. For example, more than two-thirds of non-Hispanic whites in Indiana would have to move to a new neighborhood to eliminate racially segregated neighborhoods in the state.[25]

Family responsibilities. Women are often expected to handle a majority of family responsibilities. Time use studies indicate that women spend substantially more time on household labor and childrearing than men.[26,27] At least partly for that reason, there are large disparities for women in terms of pay, business earnings, and other business outcomes.[28,29]

B. Human Capital

Human capital is the collection of personal knowledge, behaviors, experience, and characteristics that make up an individual's ability to perform and succeed in particular labor markets. Human capital factors such as education, business experience, and managerial experience have been shown to be related to business success.[30,31,32,33] Any race- or gender-based barriers in those areas may make it more difficult for minorities and women to work in relevant industries and prevent some of them from starting and operating businesses successfully.

Education. Barriers associated with educational attainment may preclude entry into or advancement in certain industries, because many occupations require at least a high school diploma, and some occupations—such as occupations in professional services—require at least a four-year college degree. In addition, educational attainment is a strong predictor of both income and personal wealth, which are both shown to be related to business formation and success.[34,35] Nationally, minorities lag behind non-Hispanic whites in terms of both educational attainment and the quality of education that they receive.[36,37] Minorities are far more likely than non-Hispanic whites to attend schools that do not provide access to core classes in science and math.[38] In addition, Black American students are more than three times more likely than non-Hispanic whites to be expelled or suspended from high school.[39] For those and other reasons, minorities are far less likely than non-Hispanic whites to attend college; enroll at highly- or moderately-selective four-year colleges; or earn college degrees.[40]

Educational outcomes for minorities in Indiana are similar to those for minorities nationwide. In Indiana public schools, Black Americans and Hispanic Americans exhibit substantially higher dropout rates than non-Hispanic whites.[41] In addition, BBC's analyses of the Indiana labor force indicate that individuals of certain minority groups are far less likely than non-Hispanic whites to earn a college degree. Figure 3-1 presents the percentage of Indiana workers that have earned a four-year college degree by racial/ethnic and gender group. As shown in Figure 3-1, Hispanic American, Black American, and Native American workers in Indiana are substantially less likely than non-Hispanic white workers to have a four-year college degree.

Figure 3-1.
Percentage of all Indiana workers 25 and older with at least a four-year degree, 2008-2012

Indiana	2008-2012	
Race/ethnicity		
Black American	19.5 %	**
Asian Pacific American	53.2	**
Subcontinent Asian American	76.2	**
Hispanic American	13.9	**
Native American	19.3	**
Other race minority	46.1	**
Non-Hispanic white	28.3	
Gender		
Women	28.3 %	**
Men	26.6	

Note:

** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 95% confidence level.

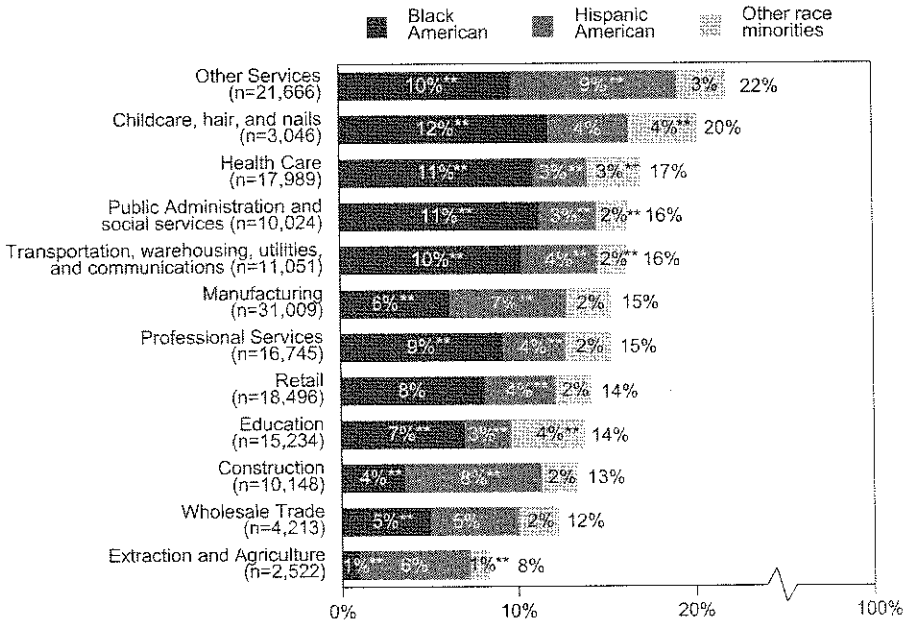
Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Employment and management experience. An important precursor to business ownership and business success is acquiring direct work and management experience in relevant industries. Any barriers that limit minorities and women from acquiring that experience could prevent them from starting and operating related businesses in the future.

Employment. On a national level, prior industry experience has been shown to be an important indicator of business ownership and success. However, minorities and women are often unable to acquire relevant work experience. Minorities and women are sometimes discriminated against in hiring decisions, which impedes their entry into the labor market.[42,43,44] When employed, minorities and women are often relegated to peripheral positions in the labor market and to industries that already exhibit high concentrations of minorities or women.[45,46,47,48] BBC's analyses of the labor force in Indiana is largely consistent with those findings. Figure 3-2 presents the representations of minority and women workers in various Indiana industries. As shown in Figure 3-2, the Indiana industries with the highest representations of minority workers are other services; childcare, hair, and nails; and healthcare. The Indiana industries with the lowest representations of minority workers are construction; wholesale trade; and extraction and agriculture.

Figure 3-2.
Percent representation of minorities in various industries in Indiana, 2008-2012



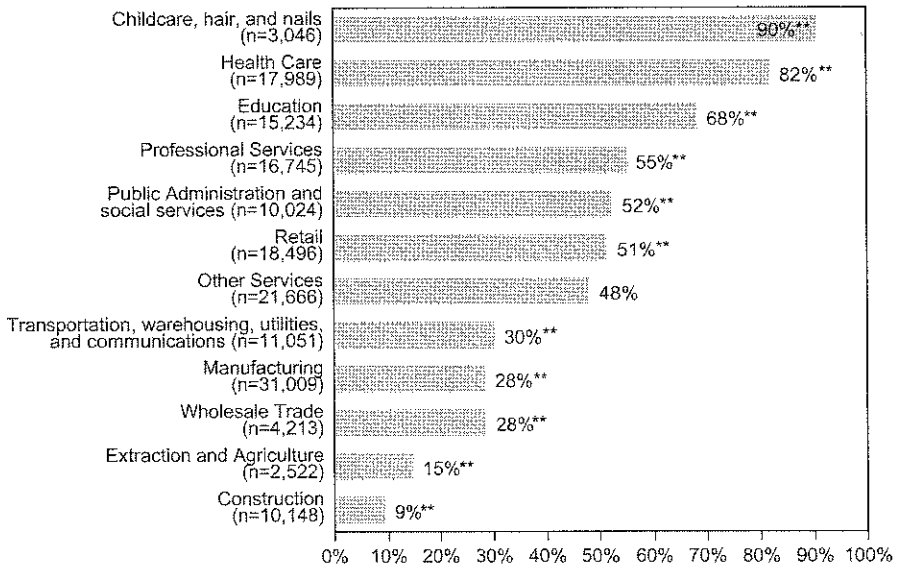
Note: ** Denotes that the difference in proportions between minority workers in the specified industry and all industries is statistically significant at the 95% confidence level. The representation of minorities among all Indiana workers is 8% for Black Americans, 5% for Hispanic Americans, 3% for other race minorities, and 16% for all minorities considered together.

Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined into one category of professional services. Workers in the rental and leasing; travel; investigation; waste remediation; arts; entertainment; recreation; accommodations; food services; and select other services were combined into one category of other services. Workers in child day care services, barber shops, beauty salons, nail salons, and other personal services were combined into one category of childcare, hair, and nails.

Source: BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure 3-3 indicates that the representation of women in Indiana industries are similar to those of minorities. Whereas there are relatively high representations of women in childcare, hair, and nails; healthcare; and education there are relatively low representations of women in wholesale trade; extraction and agriculture; and construction. Moreover, BBC found that 90 percent of women who work in the Indiana construction industry work in secretarial positions.

Figure 3-3.
Percent representation of women in various industries in Indiana, 2008-2012



Note: ** Denotes that the difference in proportions between women workers in the specified industry and all industries is statistically significant at the 95% confidence level.

Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined into one category of professional services. Workers in the rental and leasing; travel; investigation; waste remediation; arts; entertainment; recreation; accommodations; food services; and select other services were combined into one category of other services. Workers in child day care services, barber shops, beauty salons, nail salons, and other personal services were combined into one category of childcare, hair, and nails.

Source: BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Management experience. Managerial experience is an essential predictor of business success. However, race- and gender-based discrimination remains a persistent obstacle to greater diversity in management positions.[49,50,51] Nationally, minorities and women are far less likely than non-Hispanic white men to work in management positions.[52,53] Similar outcomes appear to exist for minorities and women in Indiana. BBC examined the concentration of minorities and women in management positions in the Indiana construction; professional services; and goods and support services industries. Figure 3-4 presents those results. As shown in Figure 3-4:

- A smaller percentage of Hispanic Americans than non-Hispanic whites work as managers in the Indiana construction industry. In addition, a smaller percentage of women than men work as managers in the Indiana construction industry.
- Compared to non-Hispanic whites, smaller percentages of Hispanic Americans and Native Americans work as managers in the Indiana professional services industry. In addition, a smaller percentage of women than men work as managers in the Indiana professional services industry.
- A smaller percentage of Black Americans than non-Hispanic white Americans work as managers in the Indiana goods industry.
- Compared to non-Hispanic whites, smaller percentages of Black Americans and Hispanic Americans work as managers in the support services industry. In addition, a smaller percentage of women than men work as managers in the Indiana support services industry.

Figure 3-4.
Percentage of workers who worked as a manager in each study-related industry in Indiana 2008-2012

	Construction	Professional Services	Goods	Support Services
Race/ethnicity				
Black American	5.8 %	4.9 %	0.5 % **	6.3 % **
Asian Pacific American	9.4	13.0	9.0	13.3 **
Subcontinent Asian American	37.9	7.5	10.8	21.1
Hispanic American	2.4 **	2.1 **	2.6	4.8 **
Native American	6.4	2.0 **	1.7	6.7
Other race minority	10.4	3.3	0.0	11.9
Non-Hispanic white	7.9	6.5	4.0	8.4
Gender				
Women	4.8 % **	4.6 % **	3.2 %	7.1 % **
Men	7.7	7.9	4.0	8.9
All individuals	**7.4**	**6.2**	**3.8**	**8.0**

Note: ** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 95% confidence level.

Source: BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Intergenerational business experience. Having a family member who owns a business and being able to work in that business are important predictors of business ownership and success. Such experiences help entrepreneurs gain access to important opportunity networks; obtain knowledge of best practices and business etiquette; and receive hands-on experience in helping to run businesses. However, at least nationally, minorities have substantially fewer family members who own businesses, and both minorities and women have fewer opportunities to be involved with those businesses. That lack of experience makes it more difficult for minorities and women to subsequently start their own businesses and operate them successfully.

C. Financial Capital

In addition to human capital, financial capital has been shown to be an important indicator of business formation and success.[54] Individuals can acquire financial capital through a variety of sources including employment wages, personal wealth, homeownership, and financing. If race- or gender-based discrimination exists in those capital markets, minorities and women may have difficulty acquiring the capital necessary to start, operate, or expand businesses.

Wages and income. Wage and income gaps between minorities and non-Hispanic whites and between women and men are well-documented throughout the country, even when researchers have statistically controlled for various factors unrelated to race and gender.[55,56,57] For example, national income data indicate that, on average, Black Americans and Hispanic Americans have household incomes that are less than two-thirds those of non-Hispanic whites.[58,59] Women have also faced consistent wage and income gaps relative to men. Nationally, the median hourly wage of women is still only 84 percent the median hourly wage of men.[60] Such disparities make it difficult for minorities and women to use employment wages as a source of business capital.

BBC observed wage gaps in Indiana that are consistent with those that researchers have observed nationally. Figure 3-5 presents mean annual wages for Indiana workers by race/ethnicity and gender. As shown in Figure 3-5, Black Americans, Hispanic Americans, Native Americans, and other race minorities in Indiana earn substantially less than non-Hispanic whites. In addition, women workers earn substantially less in wages than men.

Figure 3-5.
Mean annual wages among Indiana workers, 2008-2012

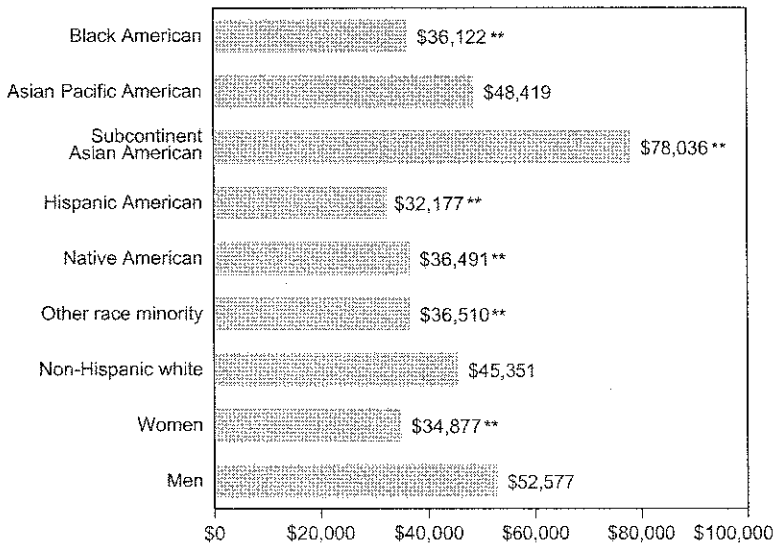
Note:

The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.

** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.



BBC also conducted regression analyses to determine whether those wage disparities exist even after statistically controlling for various race- and gender-neutral factors such as age, education, and family status. The results of those analyses indicated that being Black American, Hispanic American, Native American, or other race minority was associated with substantially lower earnings than being non-Hispanic white, even after accounting for various race- and gender-neutral factors. Similarly, being a woman was associated with lower earnings than being a man (for details, see Figure D-10 in Appendix D).

Personal wealth. Another important potential source of business capital is personal wealth. As with wages and income, there are substantial disparities between minorities and non-Hispanic whites and between women and men in terms of personal wealth.[61,62] For example, in 2010, Black Americans and Hispanic Americans across the country exhibited average household net worth that was 5 percent and 1 percent, respectively, that of non-Hispanic whites. In addition, more than one-quarter of Black Americans and Hispanic Americans were living in poverty in 2010, a substantially higher rate than the national average. Wealth inequalities also exist for women relative to men. For example, the median wealth of non-married women nationally is approximately one-third that of non-married men.[63]

Homeownership. Homeownership and home equity have been shown to be key sources of business capital.[64,65] However, minorities appear to face substantial barriers nationwide in owning homes. For example, Black Americans and Hispanic Americans own homes at less than two-thirds the rate of non-Hispanic whites.[66] Discrimination is at least partly to blame for those disparities. Research indicates that minorities continue to be given less information on prospective homes and have their purchase offers rejected because of their race.[67,68] Minorities who own homes tend to own homes that are worth substantially less than those of non-Hispanic whites and also tend to accrue substantially less equity.[69,70] Differences in home values and

equity between minorities and non-Hispanic whites can be attributed—at least, in part—to the depressed property values that tend to exist in racially-segregated neighborhoods.[71,72]

Minorities appear to face homeownership barriers in Indiana that are similar to those observed at the national level. BBC examined homeownership rates in Indiana for relevant racial/ethnic groups. As shown in Figure 3-6, all relevant minority groups in Indiana exhibit homeownership rates that are significantly lower than that of non-Hispanic whites.

Figure 3-6.
Home Ownership Rates in Indiana, 2008-2012

Note:
The sample universe is all households.
** Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level.

Source:
BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

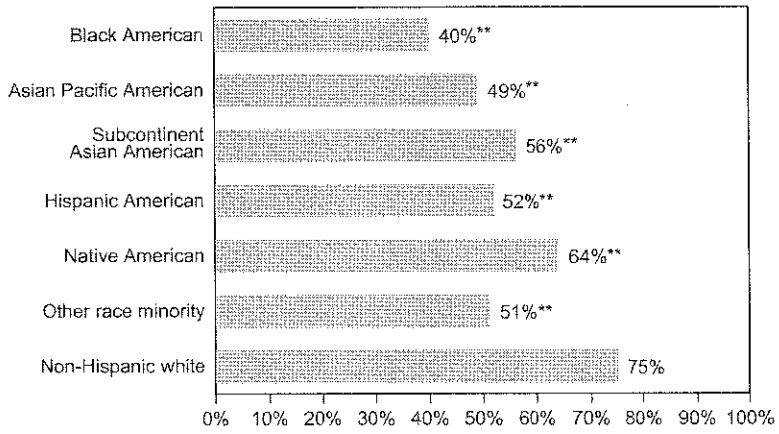
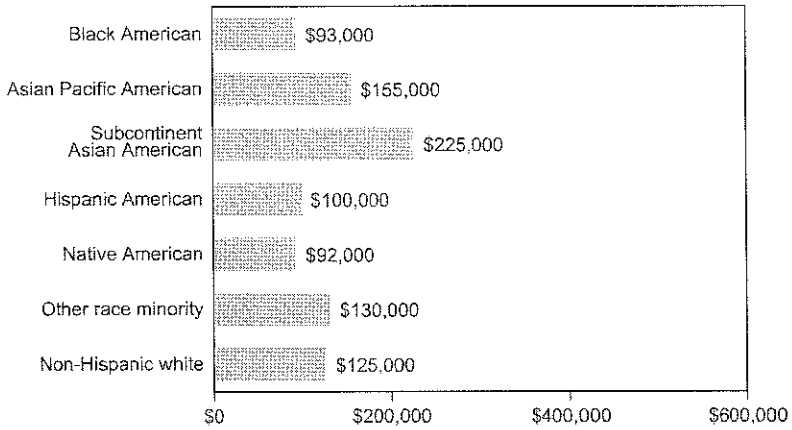


Figure 3-7 presents median home values among homeowners of different racial/ethnic groups in Indiana. Consistent with national trends, homeowners of certain minority groups—Black Americans, Hispanic Americans, and Native Americans—own homes that, on average, are worth substantially less than those of non-Hispanic whites.

Figure 3-7.
Median home values in Indiana, 2008-2012

Note:
The sample universe is all owner-occupied housing units.

Source:
BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.



Access to financing. Minorities and women face many barriers in trying to access credit and financing, both for home purchases and for business capital. Researchers have often attributed those barriers to various forms of race- and gender-based discrimination that exist in credit markets.[73,74,75,76,77,78] BBC summarizes results related to difficulties that minorities, women, and minority- and woman-owned businesses face in the home credit and business credit markets.

Home credit. Minorities and women continue to face barriers when trying to access credit to purchase homes. Examples of such barriers include discriminatory treatment of minorities and women during the pre-application phase and disproportionate targeting of minority and woman borrowers for subprime home loans.[79,80,81,82,83] Race- and gender-based barriers in home credit

markets, as well as the recent foreclosure crisis, have led to decreases in homeownership among minorities and women and eroded their levels of personal wealth.[84,85,86,87]

To examine how minorities fare in the home credit market relative to non-Hispanic whites, BBC analyzed home loan denial rates for high-income households by race/ethnicity. BBC analyzed those data for Indiana and the United States as a whole. As shown in Figure 3-8, Black Americans, Hispanic Americans, and Native Americans exhibit higher home loan denial rates than non-Hispanic whites when considering the United States as a whole. Both Black Americans and Hispanic Americans also exhibit higher home loan denial rates than non-Hispanic whites when considering Indiana alone. In addition, BBC's analyses indicate that certain minority groups in Indiana are more likely than non-Hispanic whites to receive subprime mortgages (for details, see Figure D-15 in Appendix D).

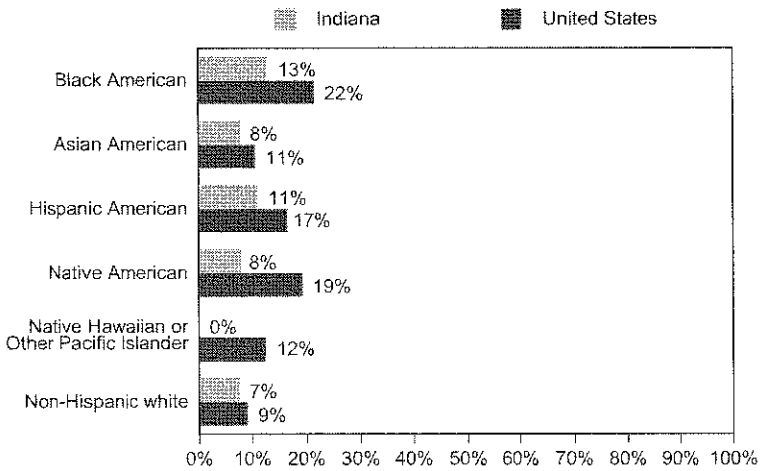
Figure 3-8.
Denial rates of conventional purchase loans for high-income households in Indiana and the United States, 2013

Note:

High-income borrowers are those households with 120% or more of the HUD area median family income (MFI).

Source:

FFIEC HMDA data 2013. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: http://www.consumerfinance.gov/hmda/explore



Business credit. Minority- and woman-owned businesses face substantial difficulties accessing business credit. For example, researchers have shown that Black American-owned and Hispanic American-owned businesses are more likely to be denied business credit, even after accounting for various race- and gender-neutral factors.[88,89] In addition, women are less likely to apply for credit, and when they do, they receive smaller loans.[90,91] Without equal access to business capital, minority- and woman-owned businesses must rely more on personal finances for their business, which leaves them at a disadvantage when trying to start and operate successful businesses.[92,93,94,95]

D. Business Ownership

Nationally, there has been substantial growth in the number of minority- and woman-owned businesses over the past 40 years. For example, from 1975 to 1990, the number of woman-owned businesses increased by 145 percent, and the number of Hispanic American-owned businesses increased by nearly 200 percent.[96] Despite the progress that minorities and women have made with regard to business ownership, important barriers in starting and operating businesses remain. Black Americans, Hispanic Americans, and women are still less likely to start businesses than non-Hispanic white men.[97,98,99] In addition, although rates of business ownership have increased among minorities and women, they have been unable to penetrate all industries evenly. Minorities and women disproportionately own businesses in industries that

require less human and financial capital to be successful and that already include large concentrations of individuals from disadvantaged groups.[100,101]

BBC examined rates of business ownership in the Indiana construction; professional services; and goods and support services industries by race/ethnicity and gender. As shown in Figure 3-9:

- Hispanic Americans exhibit lower rates of business ownership than non-Hispanic whites in the Indiana construction industry. In addition, women exhibit lower rates of business ownership than men.
- Black Americans, Hispanic Americans, Native Americans, and other race minorities exhibit lower rates of business ownership rates than non-Hispanic whites in the Indiana professional services industry. In addition, women exhibit lower rates of business ownership than men.
- Black Americans, Hispanic Americans, and other race minorities exhibit lower rates of business ownership than non-Hispanic whites in the Indiana goods industry. In addition, women exhibit lower rates of business ownership than men.
- Black Americans, Hispanic Americans, and Native Americans exhibit lower rates of business ownership than non-Hispanic whites in the Indiana support services industry.

Figure 3-9.
Business ownership rates in study-related industries in Indiana, 2008-2012

	Construction	Professional Services	Goods	Support Services
Race/ethnicity				
Black American	21.4 %	6.0 % **	3.4 % **	3.0 % **
Hispanic American	16.8 **	6.0 **	5.4 **	4.5 **
Native American	17.0	0.9 **	8.9	2.6 **
Other minority group	27.9	8.2 **	3.4 **	11.8
Non-Hispanic white	23.9	13.5	6.6	5.0
Gender				
Women	18.1 % **	9.4 % **	5.2 % **	4.6 %
Men	23.8	15.0	6.7	5.2
All individuals	**23.3 %**	**12.2 %**	**6.3 %**	**4.9 %**

Note: ** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 95% confidence level. Asian Pacific American, Subcontinent Asian American, and other race minority were combined into the single category of "Other minority group" due to small sample sizes.

Source: BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

BBC also conducted regression analyses to determine whether differences in business ownership rates between minorities and non-Hispanic whites and between women and men exist even after statistically controlling for various race- and gender-neutral factors such as income, education, and familial status. BBC conducted those analyses separately for each relevant industry in Indiana. Figure 3-10 presents the race/ethnicity and gender factors that were significantly related to business ownership for each relevant industry.

Figure 3-10.
Statistically significant relationships between race/ethnicity and gender and business ownership in study-related industries in Indiana, 2008-2012

Industry and Group	Coefficient
Construction	
Women	-0.2929
Professional Services	
Black American	-0.2144
Other minority group	-0.5243
Women	-0.2279
Goods	
Women	-0.1307

Note:

Asian Pacific American, Subcontinent Asian American, and Other race minority were combined into the single category of Other minority group due to small sample sizes.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

As shown in Figure 3-10, even after accounting for race- and gender-neutral factors:

- Being a woman was associated with lower rates of business ownership in the Indiana construction industry;
- Being Black American or other race minority was associated with lower rates of business ownership in the Indiana professional services industry;
- Being a woman was associated with lower rates of business ownership in the Indiana professional services industry; and
- Being a woman was associated with lower rates of business ownership in the Indiana goods industry.

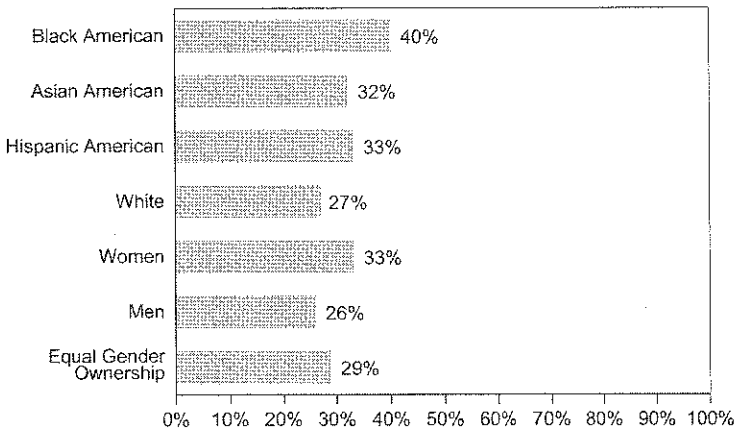
Thus, disparities in business ownership rates between minorities and non-Hispanic whites and between women and men are not completely explained by differences in race- and gender-neutral factors such as income, education, and familial status. Disparities in business ownership rates exist for several groups in various relevant industries even after accounting for such factors.

E. Business Success

There is a great deal of research indicating that, nationally, minority- and woman-owned businesses fare worse than businesses owned by non-Hispanic white men. For example, Black Americans, Native Americans, Hispanic Americans, and women exhibit higher rates of transitioning from business ownership to unemployment than non-Hispanic whites and men. In addition, minority- and woman-owned businesses have been shown to be less successful than businesses owned by non-Hispanic whites and men based on a number of different indicators including profits, closure rates, and business size (but also see Robb and Watson, 2012).[102,103,104] BBC examined data on business closure, business receipts, and business owner earnings to further explore the success of minority- and woman-owned businesses in Indiana.

Business closure. BBC examined the rates of closure among Indiana businesses by the race/ethnicity and gender of the owners. Figure 3-11 presents those results. As shown in Figure 3-11, Black American-, Asian American-, and Hispanic American-owned businesses in Indiana appear to close at higher rates than white-owned businesses. In addition, woman-owned businesses in Indiana appear to close at higher rates than business owned by men. Increased rates of business closure among minority- and woman-owned businesses may have important effects on their availability for government contracts in Indiana.

Figure 3-11.
Rates of business closure in Indiana, 2002-2006



Note:

Data include only to non-publicly held businesses.

Equal Gender Ownership refers to those businesses for which ownership is split evenly between women and men.

Statistical significance of these results cannot be determined, because sample sizes were not reported in the primary source.

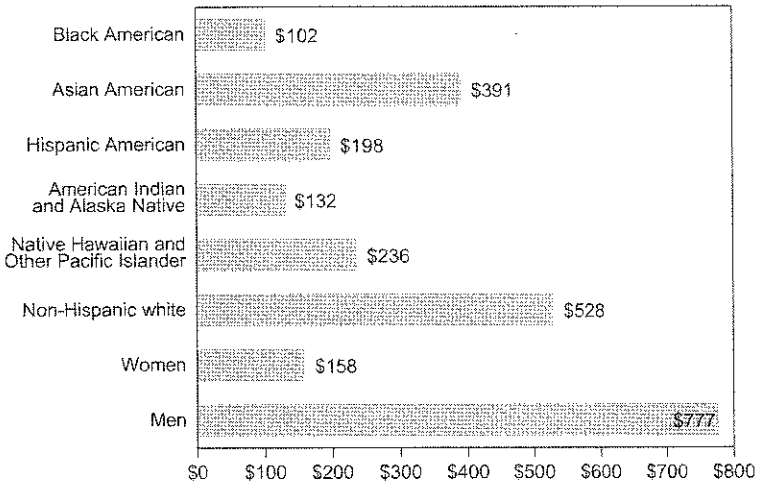
Source:

Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

Lowrey, Ying. 2014. "Gender and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

Business receipts. BBC also examined data on business receipts to assess whether minority- and woman-owned businesses in Indiana earn as much as businesses owned by non-Hispanic whites and men, respectively. Figure 3-12 shows mean annual receipts for Indiana business by the race/ethnicity and gender of owners. The data in Figure 3-12 indicate that in 2007 Black American-, Asian American-, Hispanic American-, Native American-, and Native Hawaiian and Other Pacific Islander-owned businesses in Indiana showed lower mean annual business receipts than businesses owned by non-Hispanic whites. In addition, woman-owned businesses in Indiana showed lower mean annual business receipts than businesses owned by men.

Figure 3-12.
Mean annual receipts (in thousands) of Indiana businesses, 2007



Note:

Includes employer and non-employer firms. Does not include publicly-traded companies or other firms not classifiable by race/ethnicity and gender.

Source:

2007 Survey of Business Owners, part of the U.S. Census Bureau's 2007 Economic Census.

Business owner earnings. BBC analyzed business owner earnings to assess whether minorities and women in Indiana earn as much from the businesses that they own as non-Hispanic whites and men do. As shown in Figure 3-13, Black Americans, Hispanic Americans, and Native Americans in Indiana earned less on average from their businesses than non-Hispanic whites. In addition, women in Indiana earned less from their businesses than men.

Figure 3-13.
Mean annual business owner earnings in Indiana, 2008-2012

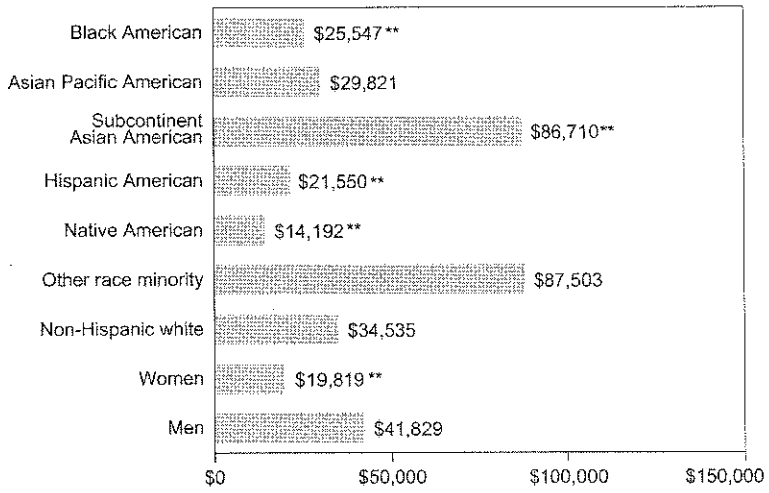
Note:

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2012 dollars.

** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.



BBC also conducted regression analyses to determine whether earnings disparities in Indiana exist even after statistically controlling for various race- and gender-neutral factors such as age, education, and family status. The results of those analyses indicated that being Black American, Hispanic American, or Native American was associated with substantially lower business owner earnings than being non-Hispanic white, even after accounting for various race- and gender-neutral factors. Similarly, being a woman was associated with substantially lower business owner earnings than being a man.

F. Summary

BBC's analyses of marketplace conditions indicate that minorities, women, and minority- and woman-owned businesses face substantial barriers nationwide and in Indiana. Existing research, as well as analyses that BBC conducted, indicate that race- and gender-based disparities exist in terms of acquiring human capital, accruing financial capital, owning businesses, and operating successful businesses. In many cases, there is evidence that those disparities exist even after accounting for various race- and gender-neutral factors such as age, income, education, and familial status. There is also evidence that many disparities are due—at least, in part—to race- and gender-based discrimination.

Barriers in the marketplace likely have important effects on the ability of minorities and women to start businesses in the Indiana industries relevant to the disparity study—construction; professional services; and goods and support services—and operating those businesses successfully. Any difficulties that minorities and women face in starting and operating businesses may reduce their availability for government work and may also reduce the degree to which they are able to successfully compete for government contracts. In addition, the existence of barriers in the Indiana marketplace indicate that government entities in the state may be passively participating in race- and gender-based discrimination that makes it more difficult for minority- and woman-owned businesses to successfully compete for their contracts. Many courts have held that passive participation in any race- or gender-based discrimination establishes a compelling governmental interest for entities to take remedial action to address such discrimination.

[1] *Adarand VII*, 228 F.3d at 1167– 76; *see also Western States Paving*, 407 F.3d at 992 (Congress "explicitly relied upon" the Department of Justice study that "documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts"); *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 2015 WL 1396376, *appeal pending*.

[2] *Adarand VII*, 228 F.3d. at 1168-70; *Western States Paving*, 407 F.3d at 992; *see DynaLantic*, 885 F.Supp.2d 237; *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 2015 WL 1396376, *appeal pending; Geyer Signal*, 2014 WL 130909297 at *14.

[3] *Adarand VII* at 1170-72; *see DynaLantic, 885* F.Supp.2d 237; *Geyer Signal*, 2014 WL 1309092 at *14.

[4] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

[5] *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994).

[6] *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041.

[7] Haney-López, Ian. 2006. *White by Law: The Legal Construction of Race*. New York: NYU Press.

[8] Woodward, Comer Vann. 1955. *The Strange Career of Jim Crow*. Oxford: Oxford University Press.

[9] Prucha, Francis Paul. 1986. *The Great Father: The United States Government and the American Indians*. Lincoln: University of Nebraska Press.

[10] Lee, Erika. 2003. *At America's Gates: Chinese Immigration During the Exclusion Era, 1882-1943*. Chapel Hill, NC: University of North Carolina Press.

[11]Goldin, Claudia. 2006. "The Quiet Revolution That Transformed Women's Employment, Education, and Family." *The American Economic Review* 96(2):1–21.

[12] Loewen, James W. 2013. *Sundown Towns: A Hidden Dimension of American Racism*. New York: The New Press.

[13] McVeigh, Rory, Daniel J. Myers, and David Sikkink. 2004. "Corn, Klansmen, and Coolidge: Structure and Framing in Social Movements." *Social Forces* 83(2):653–90.

[14] Dobbin, Frank. 2009. *Inventing Equal Opportunity*. Princeton: Princeton University Press.

[15] Holzer, Harry and David Neumark. 2000. "Assessing Affirmative Action." *Journal of Economic Literature* 38(3):483–568

[16] Kalev, Alexandra, Frank Dobbin, and Erin Kelly. 2006. "Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies." *American Sociological Review* 71(4):589–617.

[17] Kao, Grace and Jennifer S. Thompson. 2003. "Racial and Ethnic Stratification in Educational Achievement and Attainment." *Annual Review of Sociology* 29(1):417–42.

[18] DiPrete, Thomas A. and Claudia Buchmann. 2013. *The Rise of Women: The Growing Gender Gap in Education and What It Means for American Schools*. New York: Russell Sage Foundation.

[19] Travis, Jeremy, Bruce Western, and Steve Redburn. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. National Research Council. Washington D.C.: Division of Behavioral and Social Sciences and Education. Retrieved January 6, 2015 (http://www.nap.edu/booksearch.php?booksearch=1&record_id=18613&term=Black&chapter=33-69).

[20] Sakala, Leah. 2014. *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*. Northampton, MA: Prison Policy Initiative. Retrieved January 16, 2015 (http://www.prisonpolicy.org/profiles/IN.html).

[21] Pager, Devah. 2003. "The Mark of a Criminal Record." *American Journal of Sociology* 108(5):937–75.

[22] Western, Bruce and Becky Pettit. 2010. "Incarceration & Social Inequality." *Daedalus* 139(3):8–19.

[23] Charles, Camille Zubrinsky. 2003. "The Dynamics of Racial Residential Segregation." *Annual Review of Sociology* 29:167–207.

[24] Lichter, Daniel T., Domenico Parisi, and Michael C. Taquino. 2012. "The Geography of Exclusion: Race, Segregation, and Concentrated Poverty." *Social Problems* 59(3):364–88.

[25] Frey, William H. 2011. "New Racial Segregation Measures for Large Metropolitan Areas: Analysis of the 1990-2010 Decennial Census." Retrieved January 23, 2015 (http://www.psc.isr.umich.edu/dis/census/segregation2010.html).

[26]Bianchi, Suzanne M., Liana C. Sayer, Melissa A. Milkie, and John P. Robinson. 2012. "Housework: Who Did, Does or Will Do It, and How Much Does It Matter?" *Social Forces* 91(1):55–63.

[27] Hochschild, Arlie and Anne Machung. 2012. *The Second Shift: Working Families and the Revolution at Home*. New York: Penguin.

[28] Loscocco, Karyn and Sharon R. Bird. 2012. "Gendered Paths: Why Women Lag Behind Men in Small Business Success." *Work and Occupations* 39(2):183–219.

[29] Cha, Youngjoo and Kim A. Weeden. 2014. "Overwork and the Slow Convergence in the Gender Gap in Wages." *American Sociological Review* 79(3):457–84.

[30] Fairlie, Robert W. and Alicia M. Robb. 2007. "Why Are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital." *Journal of Labor Economics* 25(2):289–323.

[31] Fairlie, Robert W. and Alicia M. Robb. 2008. *Race and Entrepreneurial Success: Black-, Asian-, and White-Owned Businesses in the United States*. Cambridge, Mass.: MIT Press.

[32] Fairlie, Robert W. and Alicia M. Robb. 2009. "Gender Differences in Business Performance: Evidence From the Characteristics of Business Owners Survey." *Small Business Economics* 33(4):375–95.

[33] Hout, Michael and Harvey Rosen. 2000. "Self-Employment, Family Background, and Race." *Journal of Human Resources* 35(4):670–92.

[34] Emmons, William R. and Bryan J. Noeth. 2015. *Why Didn't Higher Education Protect Hispanic and Black Wealth?* St. Louis, MO: Center for Household Financial Stability. Retrieved August 20, 2015 (https://www.stlouisfed.org/~/media/Publications/In%20the%20Balance/Images/Issue_12/ITB_August_2015.pdf).

[35] Shapiro, Thomas, Tatjana Meschede, and Sam Osoro. 2013. *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*. Waltham, MA: Institute on Assets and Social Policy. Retrieved January 2, 2015 (http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf).

[36] National Center for Education Statistics. 2010. *Status and Trends in the Education of Racial and Ethnic Minorities*. National Center for Education Statistics. Retrieved January 20, 2015 (http://nces.ed.gov/pubs2010/2010015/tables.asp).

[37] Kao, Grace and Jennifer S. Thompson. 2003. "Racial and Ethnic Stratification in Educational Achievement and Attainment." *Annual Review of Sociology* 29(1):417–42.

[38] U.S. Department of Education Office for Civil Rights. 2014a. *College and Career Readiness*. Washington D.C.: U.S. Department of Education. Retrieved January 3, 2015 (http://www2.ed.gov/about/offices/list/ocr/docs/crdc-college-and-career-readiness-snapshot.pdf).

[39] U.S. Department of Education Office for Civil Rights. 2014b. *School Discipline, Restraint, and Seclusion Highlights*. Washington D.C.: U.S. Department of Education. Retrieved January 3, 2015 (http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf).

[40] Bozkick, Robert and Erich Lauff. 2007. Education Longitudinal Study of 2002 (ELS:2002): *A First Look at the Initial Postsecondary Experiences of the High School Sophomore Class of 2002*. National Center for Education Statistics. Retrieved January 20, 2015 (http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2008308).

[41] Stillwell, Robert and Jennifer Sable. 2013. *Public School Graduates and Dropouts from the Common Core of Data: School Year 2009–10*. National Center for Education Statistics. Retrieved January 1, 2015 (http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2013309rev).

[42] Correll, Shelley J., Stephen Benard, and In Paik. 2007. "Getting a Job: Is There a Motherhood Penalty?" *American Journal of Sociology* 112(5):1297–1339.

[43] Pager, Devah, Bruce Western, and Bart Bonikowski. 2009. "Discrimination in a Low-Wage Labor Market A Field Experiment." *American Sociological Review* 74(5):777–99.

[44] Bertrand, Marianne and Sendhil Mullainathan. 2004. "Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination." *American Economic Review* 94(4):991–1013.

[45] Beck, E. M., Patrick M. Horan, and Charles M. Tolbert II. 1980. "Industrial Segmentation and Labor Market Discrimination." *Social Problems* 28(2):113–30.

[46] Catanzarite, Lisa. 2003. "Race-Gender Composition and Occupational Pay Degradation." *Social Problems* 50(1):14–37.

[47] Cohen, Philip N. and Matt L. Huffman. 2003. "Occupational Segregation and the Devaluation of Women's Work across U.S. Labor Markets." *Social Forces* 81(3):881–908.

[48] Huffman, Matt L. and Philip N. Cohen. 2004. "Racial Wage Inequality: Job Segregation and Devaluation across U.S. Labor Markets." *American Journal of Sociology* 109(4):902–36.

[49] Wilson, George and Debra Branch McBrier. 2005. "Race and Loss of Privilege: African American/White Differences in the Determinants of Job Layoffs From Upper-Tier Occupations." *Sociological Forum* 20(2):301–21.

[50] Roscigno, Vincent J., Lisette M. Garcia, and Donna Bobbitt-Zeher. "Social Closure and Processes of Race/Sex Employment Discrimination." *The Annals of the American Academy of Political and Social Science* 609 (1): 16-48.

[51] Roscigno, Vincent J. , Lisa M. Williams, and Reginald A. Byron. 2012. "Workplace Racial Discrimination and Middle Class Vulnerability." *American Behavioral Scientist* 56(5):696-710.

[52] Smith, Ryan A. 2002. "Race, Gender, and Authority in the Workplace: Theory and Research." *Annual Review of Sociology* 28:509–42.

[53] Wilson, George. 1997. "Pathways to Power: Racial Differences in the Determinants of Job Authority." *Social Problems* 44(1):38–54.

[54] Robb, Alicia and Robert Fairlie. 2007. "Access to Financial Capital among U.S. Businesses: The Case of African American Firms." *The Annals of the American Academy of Political and Social Science* 613(1):47–72.

[55] Cha, Youngjoo and Kim A. Weeden. 2014. "Overwork and the Slow Convergence in the Gender Gap in Wages." *American Sociological Review* 79(3):457–84.

[56] McCall, Leslie. 2001. "Sources of Racial Wage Inequality in Metropolitan Labor Markets: Racial, Ethnic, and Gender Differences." *American Sociological Review* 66(4):520–41.

[57] Tomaskovic-Devey, Donald. 1993b. "The Gender and Race Composition of Jobs and the Male/Female, White/Black Pay Gaps." *Social Forces* 72(1):45–76.

[58] Economic Policy Institute. 2012a. *African Americans*. Washington D.C.: Economic Policy Institute. Retrieved January 20, 2015 (http://stateofworkingamerica.org/files/book/factsheets/african-americans.pdf).

[59] Economic Policy Institute. 2012b. *Latinos*. Washington D.C.: Economic Policy Institute. Retrieved January 20, 2015 (http://www.stateofworkingamerica.org/fact-sheets/latinos/).

[60] Economic Policy Institute. 2012c. *Women*. Washington D.C.: Economic Policy Institute. Retrieved January 20, 2015 (http://www.stateofworkingamerica.org/fact-sheets/women/).

[61]Shapiro, Thomas, Tatjana Meschede, and Sam Osoro. 2013. *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*. Waltham, MA: Institute on Assets and Social Policy. Retrieved January 2, 2015 (http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf).

[62] Sullivan, Laura, Tatjana Meschede, Lars Dietrich, Thomas Shapiro, Amy Traub, Catherine Ruetschlin, and Tamara Draut. 2015. *The Racial Wealth Gap: Why Policy Matters*. New York: Demos. Retrieved August 28, 2015 (http://www.demos.org/sites/default/files/publications/RacialWealthGap_1.pdf)

[63] Chang, Mariko Lin. 2010. *Shortchanged: Why Women Have Less Wealth and What Can Be Done About It*. Oxford: Oxford University Press.

[64] Berger, Allen N. and Gregory F. Udell. 1998. "The Economics of Small Business Finance: The Roles of Private Equity and Debt Markets in the Financial Growth Cycle." *Journal of Banking & Finance* 22(6–8):613–73.

[65] Fairlie, Robert W. and Harry A. Krashinsky. 2012. "Liquidity Constraints, Household Wealth, and Entrepreneurship Revisited." *Review of Income & Wealth* 58(2):279–306.

[66] U. S. Census Bureau. 2013a. "American Community Survey 2013 1 Year Estimates." Retrieved January 20, 2015 (http://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t).

[67] Turner, Margery Austen, Rob Santos, and Diane K. Levy, Doug Wissoker, Claudia Aranda, and Rob Pitingolo. 2013. *Housing Discrimination Against Racial and Ethnic Minorities 2012*. Washington, D.C.: U.S. Department of Housing and Urban Development. Retrieved January 2, 2015 (http://www.huduser.org/portal/publications/fairhsg/hsg_discrimination_2012.html).

[68] Roscigno, Vincent J., Diana L. Karafin, and Griff Tester. 2009. "The Complexities and Processes of Racial Housing Discrimination." *Social Problems* 56(1): 49-69.

[69] Kochhar, Rakesh and Richard Fry. 2014. "Wealth Inequality Has Widened along Racial, Ethnic Lines since End of Great Recession." *Pew Research Center*. Retrieved December 29, 2014 (http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/).

[70] Burd-Sharps, Sarah and Rebecca Rasch. 2015. *Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations*. Brooklyn, NY: Social Science Research Council. Retrieved June 23, 2015. (http://www.ssrc.org/publications/view/129CDF74-1F11-E511-940A-005056AB4B80/).

[71] Charles, Camille Zubrinsky. 2003. "The Dynamics of Racial Residential Segregation." *Annual Review of Sociology* 29:167–207.

[72] Shapiro, Thomas, Tatjana Meschede, and Sam Osoro. 2013. *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*. Waltham, MA: Institute on Assets and Social Policy. Retrieved January 2, 2015 (http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf).

[73] Blanchard, Lloyd, Bo Zhao, and John Yinger. 2008. "Do Lenders Discriminate Against Minority and Woman Entrepreneurs?" *Journal of Urban Economics* 63(2):467–97.

[74] Cavalluzzo, Ken S., Linda C. Cavalluzzo, and John D. Wolken. 2002. "Competition, Small Business Financing, and Discrimination: Evidence from a New Survey." *The Journal of Business* 75(4):641–79.

[75] Cavalluzzo, Ken and John Wolken. 2005. "Small Business Loan Turndowns, Personal Wealth, and Discrimination." *The Journal of Business* 78(6):2153–78.

[76] Gruenstein Bocian, Debbie, Wei Li, Carolina Reid, and Robert G. Quercia. 2011. *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures*. Washington D.C.: Center for Responsible Lending. Retrieved January 21, 2015

[77] Mijid, Naranchimeg and Alexandra Bernasek. 2013. "Gender and the Credit Rationing of Small Businesses." *The Social Science Journal* 50(1):55–65.

[78] Ross, Stephen L. and John Yinger. 2002. *The Color of Credit: Mortgage Discrimination, Research Methodology, and Fair-Lending Enforcement*. Cambridge, MA: MIT Press.

[79] Ross, Stephen L., Margery Austin Turner, Erin Godfrey, and Robin R. Smith. 2008. "Mortgage Lending in Chicago and Los Angeles: A Paired Testing Study of the Pre-Application Process." *Journal of Urban Economics* 63(3):902–19.

[80] Dymski, Gary, Jesus Hernandez, and Lisa Mohanty. 2013. "Race, Gender, Power, and the US Subprime Mortgage and Foreclosure Crisis: A Meso Analysis." *Feminist Economics* 19(3):124–51.

[81] Fishbein, Allen J. and Patrick Woodall. 2006. *Women are Prime Targets Subprime: Women Are Disproportionately Represented in High-Cost Mortgage Market*. Washington D.C.: Consumer Federation of America. Retrieved January 5, 2015 (http://policylinkcontent.s3.amazonaws.com/WomenPrimeTargetsSubprimeLending_CFA_0.pdf).

[82] Williams, Richard, Reynold Nesiba, and Eileen Diaz McConnell. 2005. "The Changing Face of Inequality in Home Mortgage Lending." *Social Problems* 52(2):181–208.

[83] Wyly, Elvin and C. S. Ponder. 2011. "Gender, Age, and Race in Subprime America." *Housing Policy Debate* 21(4):529–64.

[84] Baker, Amy Castro. 2011. *Tearing Down the Wealth of Women*. New York: Women's Media Center. Retrieved January 5, 2015 (http://www.womensmediacenter.com/feature/entry/tearing-down-the-wealth-of-women).

[85] Baker, Amy Castro. 2014. "Eroding the Wealth of Women: Gender and the Subprime Foreclosure Crisis." *Social Service Review* 88(1):59–91.

[86] Rugh, Jacob S. and Douglas S. Massey. 2010. "Racial Segregation and the American Foreclosure Crisis." *American Sociological Review* 75(5):629–51.

[87] Burd-Sharps, Sarah and Rebecca Rasch. 2015. *Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations*. Brooklyn, NY: Social Science Research Council. Retrieved June 23, 2015. (http://www.ssrc.org/publications/view/129CDF74-1F11-E511-940A-005056AB4B80/).

[88] Blanchard, Lloyd, Bo Zhao, and John Yinger. 2008. "Do Lenders Discriminate Against Minority and Woman Entrepreneurs?" *Journal of Urban Economics* 63(2):467–97.

[89] Blanchflower, David G., Phillip B. Levine, and David J. Zimmerman. 2003. "Discrimination in the Small Business Credit Market." *The Review of Economics and Statistics* 85(4):930–43.

[90] Mijid, Naranchimeg and Alexandra Bernasek. 2013. "Gender and the Credit Rationing of Small Businesses." *The Social Science Journal* 50(1):55–65.

[91] Treichel, Monica Zimmerman and Jonathan A. Scott. 2006. "Women-Owned Businesses and Access to Bank Credit: Evidence from Three Surveys Since 1987." *Venture Capital* 8(1):51–67.

[92] Coleman, Susan and Alicia Robb. 2009. "A Comparison of New Firm Financing by Gender: Evidence from the Kauffman Firm Survey Data." *Small Business Economics* 33(4):397–411.

[93] Robb, Alicia and Robert Fairlie. 2007. "Access to Financial Capital among U.S. Businesses: The Case of African American Firms." *The Annals of the American Academy of Political and Social Science* 613(1):47–72.

[94] Robb, Alicia M., Robert W. Fairlie, and David T. Robinson. 2009. *Patterns of Financing: A Comparison between White- and African-American Young Firms*. Kansas City, MO: Ewing Marion Kauffman Foundation. Retrieved January 21, 2015 (http://www.kauffman.org/what-we-do/research/kauffman-firm-survey-series/patterns-of-financing-a-comparison-between-white-and-africanamerican-young-firms).

[95] Fairlie, Robert W. and Harry A. Krashinsky. 2012. "Liquidity Constraints, Household Wealth, and Entrepreneurship Revisited." *Review of Income & Wealth* 58(2):279–306.

[96] Blanchflower, David G. 2008. *Minority Self-Employment in the United States and the Impact of Affirmative Action Programs*. Cambridge, MA: National Bureau of Economic Research, Retrieved January 15, 2015 (http://www.nber.org/papers/w13972).

[97] Fairlie, Robert W. and Alicia M. Robb. 2009b. "Gender Differences in Business Performance: Evidence from the Characteristics of Business Owners Survey." *Small Business Economics* 33(4):375–95.

[98] Fairlie, Robert W. 2006. "Entrepreneurship among Disadvantaged Groups: Women, Minorities, and the Less Educated." Pp. 437–75 in *The Life Cycle of Entrepreneurial Ventures*, edited by Simon Parker. Springer Science & Business Media.

[99] Fairlie, Robert W. and Alicia M. Robb. 2008. *Race and Entrepreneurial Success: Black-, Asian-, and White-Owned Businesses in the United States*. Cambridge, Mass.: MIT Press.

[100] Budig, Michelle J. 2006b. "Intersections on the Road to Self-Employment: Gender, Family and Occupational Class." *Social Forces* 84(4):2223–39.

[101] Lofstrom, Magnus and Timothy Bates. 2013. "African Americans' Pursuit of Self-Employment." *Small Business Economics* 40(1):73–86.

[102] Fairlie, Robert W. and Alicia M. Robb. 2008. *Race and Entrepreneurial Success: Black-, Asian-, and White-Owned Businesses in the United States*. Cambridge, Mass.: MIT Press.

[103] Coleman, Susan and Alicia Robb. 2009. "A Comparison of New Firm Financing by Gender: Evidence from the Kauffman Firm Survey Data." *Small Business Economics* 33(4):397–411.

[104] Robb, Alicia M. and John Watson. 2012. "Gender Differences in Firm Performance: Evidence from New Ventures in the United States." *Journal of Business Venturing* 27(5):544–58.

CHAPTER 4.
Collection and Analysis of Contract Data

Chapter 4 provides an overview of the policies that the Indiana Department of Transportation (INDOT) uses to award contracts; the contracts that the study team analyzed as part of the disparity study; and the process that the study team used to collect relevant prime contract and subcontract data.[1] Chapter 4 is organized into seven parts:

A. Overview of contracting policies;

B. Collection and analysis of contract data;

C. Collection of vendor data;

D. Relevant geographic market area;

E. Relevant types of work;

F. Collection of bid and proposal data; and

G. Agency review process.

A. Overview of Contracting Policies

INDOT is responsible for maintaining and regulating transportation and transportation-related infrastructure across the state of Indiana. INDOT's Construction Division is responsible for managing construction-related projects, INDOT's Consulting Division manages construction-related professional services projects, and INDOT's Procurement Division manages procurements related to goods and non-professional support services.

Construction Division. The Construction Division is responsible for awarding construction-related projects including construction and maintenance of the Indiana state highway system. The Construction Division awards all contracts on a low-bid basis, and there are no dollar thresholds above or below which procurement policies change.

Prequalification. Indiana State Code IC-8-23-2-6 requires contractors submitting bids for INDOT construction-related contracts to be prequalified in one or more work types relevant to the type of work that INDOT needs completed. As part of the prequalification process, contractors must also provide information related to insurance and liability and the financial health of their businesses.

Bid and award process. INDOT advertises bid opportunities on its website four weeks before the bid due date. Contractors desiring to submit a bid must register with INDOT as a valid bidder prior to submitting a bid. INDOT's Construction Division uses an electronic bidding service, Bid Express, through which contractors must submit bids. INDOT then awards contracts to the lowest responsive and responsible bidder.

---

[1] The terms "contract" and "procurement" are used interchangeably in this report unless otherwise noted.

Consulting Division. The Consulting Division is responsible for awarding construction-related professional services projects and uses procurement methods similar to those of the Construction Division.

Prequalification. Consultants submitting proposals for INDOT professional services contracts must be prequalified in one or more work types relevant to the type of work that INDOT needs completed. The prequalification process requires consultants to provide information related to insurance and liability; financial health; and technical capabilities.

Request for Proposals (RFP) and award process. INDOT advertises RFPs on its website and through email notifications sent to registered consultants. INDOT then scores and ranks all proposals on the basis of qualifications and competence. The proposal receiving the highest evaluation score is reviewed by INDOT's Selection Review Committee for final recommendation and is then approved by the INDOT Commissioner.

Small purchase procedures. Professional services contracts worth $75,000 or less may be awarded through a simplified small purchase procedure. For small purchases, INDOT is required to solicit proposals from three prequalified businesses known to provide the services that INDOT requires. If the project is federally-funded, INDOT must solicit at least one proposal from a certified disadvantaged business enterprise (DBE). The Consulting Division then scores the proposals based on qualifications and competence and sends the highest scored proposal to the Consultant Contracting Manager for approval and execution.[2]

Procurement Division. INDOT's Procurement Division awards procurements related to goods and non-professional support services. The contracting policies that the Procurement Division uses are governed by Indiana Code Title 5, Article 22 (IC 5-22) and can be categorized into six general procurement categories:

- Purchases worth $1,000 or less;
- Purchases worth at least $1,000 but less than $75,000;
- Purchases worth $75,000 or more;
- Quantity purchase agreements (QPAs);
- RFPs; and
- Special procurements.

There are six INDOT districts within Indiana, and every bid opportunity worth $25,000 or more must go through the Procurement Division at the central office in Indianapolis. In most cases, INDOT delegates purchasing authority to individual districts for procurements worth less than $25,000.

---

[2] Small purchase procedures did not exist until 2015 and thus do not apply to transportation-related professional services projects that BBC Research & Consulting included in the disparity study analyses.

Purchases worth $1,000 or less. In general, if a contract is worth less than $1,000, and if the price is deemed fair and reasonable, INDOT can execute purchases without using a competitive procurement process. The purchasing INDOT district must solicit quotes from at least one person or business known to provide the goods or services that INDOT requires. The purchasing district then processes the procurement through a direct payment voucher.

Purchases worth at least $1,000 but less than $75,000. INDOT awards procurements worth at least $1,000 but less than $75,000 using small purchasing procedures. For procurements of that size, INDOT generally follows one of two procurement methods. For procurements worth at least $1,000 but less than $25,000, the purchasing INDOT district has the authority to solicit their own bids. INDOT districts must solicit bids from at least three bidders. Districts review the bids that they receive and make awards to the lowest responsible and responsive bidder.

If the value of the procurement is at least $25,000 but is less than $75,000, the purchasing district must submit a requisition package to INDOT's Procurement Division at the central office. The purchasing district then solicits bids through an Invitation for Bid (IFB). Solicitations must remain open for at least seven calendar days before the bid due date. Districts then review the bids that they receive and make awards to the lowest responsible and responsive bidder.

All bid opportunities worth at least $1,000 are advertised on the INDOT website. INDOT is required to open all bids obtained by small purchase methods publicly but is not required to read them aloud.

Purchases worth $75,000 or more. INDOT's Procurement Division at the central office is responsible for soliciting and awarding procurements worth $75,000 or more. For procurements of that size, INDOT generally follows one of two procurement methods.

Competitive bidding. Competitive bidding differs from small purchase procedures in terms of a few, minor procedural requirements. If the procurement is worth $75,000 or more, an IFB package is issued and must be advertised twice. INDOT is required to publish procurements of that size in the Indianapolis Star. INDOT is required to open and read all competitive bids that it receives aloud at a designated public meeting.

Negotiated Bidding. Negotiated bidding differs from competitive bidding only in a few procedural requirements. In accordance with IC 5-22-7.3, negotiated bids are not opened publicly. Instead, they are opened by employees of INDOT's Procurement Division. A solicitation designated as a negotiated bid allows INDOT to conduct discussions with bidders before awarding contracts. Discussions must be consistent across all bidders to ensure fair competition. INDOT uses negotiated bidding to award contracts where cost is the primary consideration.[3]

QPAs. On behalf of INDOT, the Procurement Division, may enter into a QPA agreement in which vendors provide stated unit prices for quantities of goods and services that are guaranteed for specific timeframes (typically two years). When an INDOT district requires a good or support

[3] IC 5-22-7.3.

service that appears on a fully-executed QPA agreement, the district completes a QPA requisition and issues a purchase order.

RFPs. For procurements where cost is not the primary factor that INDOT considers, the agency is required to publically advertise bidding opportunities through an RFP process. INDOT is required to publish all procurement opportunities obtained through an RFP process in the Indianapolis Star. Appointed selection committees award the contracts based on pre-determined selection criteria and best value.[4]

Special procurements. INDOT can use special and emergency purchasing methods in situations provided in IC 5-22-10. The need for special procurements must qualify under one of the criteria listed in that section including:

- Purchases made under emergency conditions;
- Purchases that involve substantial savings to the governmental body;
- Purchases made at auctions;
- Software purchases;
- Purchases of specialty equipment;
- Purchases of copyrighted material;
- Purchases where there is a single source for supply;
- Purchases of supplies transferred from the federal government; and
- Purchases where there is no offer under another purchasing method.

INDOT must provide written justification for why a special procurement method is necessary.

B. Collection and Analysis of Contract Data

BBC Research & Consulting (BBC) collected contracting and vendor data from INDOT's Construction Division, Consulting Division, and Procurement Division to serve as the basis for key disparity study analyses including the utilization, availability, and disparity analyses. The study team collected the most comprehensive set of data that was available on prime contracts and subcontracts that INDOT awarded during the study period (i.e., July 1, 2009 through June 30, 2013). BBC sought data that included information about prime contractors and subcontractors regardless of the race/ethnicity and gender of their owners or their statuses as certified minority- or women-owned business enterprises (MBE/WBEs). The study team collected data on construction; professional services; and goods and support services prime contracts and subcontracts that INDOT awarded during the study period.

As part of its implementation of the Federal DBE Program, as appropriate, INDOT applied DBE goals to individual construction and professional services contracts to meet its overall goal for DBE participation on federally-funded projects (77%). In addition, as part of its compliance with

[4] IC 5-22-9.

the State of Indiana's MBE/WBE Program, INDOT encouraged aspirational MBE/WBE goals for most goods and support services contracts that it awarded during the study period. The study team's analyses included contracts and procurements worth $10,000 or more.[5]

Prime contract data collection. INDOT provided the study team with electronic data on construction; professional services; and goods and support services prime contracts that the agency awarded during the study period. BBC collected the following information about each relevant construction; professional services; and goods and support services prime contract:

- Contract or purchase order number;
- Description of work;
- Award date;
- Award amount (including change orders and amendments);
- Amount paid-to-date;
- Location of work;
- Prime contractor name; and
- Prime contractor identification number.

INDOT advised the study team on how to interpret the provided data including how to identify unique bid opportunities and, as appropriate, how to aggregate related procurement dollar amounts.

Subcontract data collection. INDOT also provided the study team with electronic data on subcontracts that the agency awarded during the study period related to construction and professional services contracts. In order to gather more comprehensive subcontract data, the study team conducted surveys with prime contractors to collect information on the subcontracts that were associated with contracts that INDOT awarded during the study period. BBC sent out surveys to request subcontract data from construction and professional services prime contractors to which INDOT awarded at least one prime contract worth $200,000 or more. After the first round of surveys, BBC sent a follow-up round of surveys to all prime contractors that had not yet responded. After the follow-up round of surveys, INDOT contacted the 10 remaining unresponsive prime contractors with the highest valued contracts. BBC collected the following information about each relevant subcontract as part of the survey process:

- Associated prime contract number;
- Amount paid on the subcontract as of the first quarter of 2015;
- Amount awarded on the subcontract;

[5] The study team chose $10,000 as its threshold for analysis, because procurements of $10,000 or more accounted for more than 99 percent of all INDOT contract and procurement dollars during the study period.

- Description of work; and
- Subcontractor name.

BBC initially sent surveys to 221 prime contractors to collect subcontract data on 875 contracts. Those contracts accounted for approximately $4.4 billion of INDOT's contracting dollars during the study period. Through the survey effort, BBC collected subcontract data for more than $2.8 billion, or 65 percent, of those contract dollars.

Contracts included in study analyses. The study team collected information on 8,263 prime contracts and 12,923 associated subcontracts that INDOT awarded during the study period in the areas of construction; professional services; and goods and support services. Those contracts accounted for approximately $6.4 billion of INDOT contracting dollars during the study period. Figure 4-1 presents dollars by relevant contracting area for the prime contracts and subcontracts that the study team included in its analyses.

Figure 4-1.
Number of INDOT contracts included in the study

Note:

Numbers rounded to nearest dollar and thus may not sum exactly to totals.

Source:

BBC Research & Consulting from INDOT contract data.

Contract Type	Number	Dollars (Thousands)
Construction		
FHWA-funded	13,927	$4,761,336
State-funded	3,152	782,144
Total contruction	**17,079**	**$5,543,480**
Professional services		
FHWA-funded	2,935	$651,683
State-funded	417	48,132
Total professional services	**3,352**	**$699,815**
Goods and support services		
FHWA-funded	196	$31,127
State-funded	559	159,076
Total goods and support services	**755**	**$190,203**
Total contracts		
FHWA-funded	17,058	$5,444,146
State-funded	4,128	$989,352
Total	**21,186**	**$6,433,498**

Prime contract and subcontract amounts. For each contract included in the study team's analyses, BBC examined the dollars that INDOT paid to each prime contractor as of the first quarter of 2015 and the dollars that the prime contractor paid to any subcontractors.[6]

- If a contract did not include any subcontracts, the study team attributed the entire amount paid during the study period to the prime contractor.
- If a contract included subcontracts, the study team calculated subcontract amounts as the total amount paid to each subcontractor during the study period. BBC then calculated the

[6] BBC used the amount paid to prime contractors and subcontractors during the study period in all cases that it was available. In all other cases, BBC used the amount awarded to prime contractors and subcontractors.

prime contract amount as the total amount paid during the study period less the sum of dollars paid to all subcontractors.

C. Collection of Vendor Data

INDOT maintains a list of businesses that have worked with INDOT on a construction-related or construction-related professional services contact. INDOT uses that database to notify qualified businesses about bid opportunities. In addition, INDOT works with the Indiana Department of Administration (IDOA) to maintain a vendor database with data on all vendors who have received work from IDOA or other state agencies including work with INDOT. The study team compiled the following information on businesses that participated on INDOT construction; professional services; and goods and support services contracts and procurements awarded during the study period:

- Business name;
- Addresses and phone numbers;
- Ownership status (i.e., whether each business was minority- or woman-owned);
- Ethnicity of ownership (if minority-owned);
- MBE/WBE certification status;
- DBE certification status;
- Primary line of work;
- Business size;
- Year of establishment; and
- Additional contact information.

BBC relied on a variety of sources for that information, including:

- INDOT contract data;
- INDOT vendor lists;
- IDOA vendor data;
- State of Indiana MBE/WBE certification list;
- City of Indianapolis MBE/WBE certification list;
- INDOT DBE certification list;
- Small Business Administration certification and ownership lists, including 8(a) HUBZone and self-certification lists;
- Dun & Bradstreet (D&B) business listings and other business information sources;
- Telephone surveys that the study team conducted with business owners and managers as part of the utilization and availability analyses;

- Business websites; and
- Reviews that INDOT conducted of study information.

D. Relevant Geographic Market Area

The study team used INDOT's contracting and vendor data to help determine the relevant geographic market area—the geographical area in which the agency spends the substantial majority of its contracting dollars—for the study. The study team's analysis showed that 88 percent of INDOT's construction; professional services; and goods and support services contracting dollars during the study period went to businesses with locations in Indiana, indicating that Indiana should be considered the relevant geographic market area for the study. BBC's analyses—including the availability analysis and quantitative analyses of marketplace conditions—focused on Indiana.

E. Relevant Types of Work

For each prime contract and subcontract, the study team determined the prime contractor's *subindustry* that best characterized the business's primary line of work (e.g., heavy construction). BBC identified subindustries based on INDOT contract data; telephone surveys that BBC conducted with prime contractors and subcontractors; business certification lists; D&B business listings; and other sources. BBC developed subindustries based in part on 8-digit D&B industry classification codes. Figure 4-2 presents the dollars that the study team examined in the various construction; professional services; and goods and support services subindustries that BBC included in its analyses.

The study team combined related subindustries that accounted for relatively small percentages of total contracting dollars into five "other" subindustries—"other construction services," "other construction materials," "other professional services," "other goods," and "other support services." For example, the contracting dollars that INDOT awarded to contractors for "document storage service" represented less than 1 percent of total INDOT contract dollars that BBC examined in the study. BBC combined "document storage service" with other support services subindustries that also accounted for relatively small percentages of total contracting dollars and that were relatively dissimilar to other subindustries into the "other support services" subindustry.

There were also contracts that were categorized in various subindustries that BBC did not include as part of its analyses, because they are not typically analyzed as part of disparity studies. BBC did not include contracts in its analyses that:

- Were classified in subindustries that reflected *national markets* (i.e., subindustries that are dominated by large national or international businesses) or were classified in subindustries for which INDOT awarded the majority of contracting dollars to businesses located outside of Indiana ($274 million of associated contract dollars);[7]

[7] Examples of such industries include computers and computer equipment; banking; insurance; and software.

Figure 4-2.
INDOT contract dollars by subindustry

Note:

Numbers rounded to nearest dollar and thus may not sum exactly to totals.

Source:

BBC Research & Consulting from INDOT contract data.

Industry	Total (in Thousands)
Construction	
Heavy construction	$3,369,581
Excavation	595,794
Other construction materials	305,239
Water, sewer, and utility lines	212,796
Concrete work	146,508
Structural steel and building construction	137,249
Electrical equipment and supplies	112,831
Other construction services	85,738
Trucking, hauling, and storage	83,720
Landscape services	77,543
Wrecking and demolition	77,536
Fencing, guardrails, and signs	61,728
Electrical work	60,472
Masonry, drywall, and stonework	34,724
Painting	27,821
Heavy construction equipment	22,415
Structural metals	20,928
Concrete and related products	20,310
Industrial equipment and machinery	17,075
Plumbing and HVAC	10,534
Roofing	6,491
Residential construction	3,561
Ceiling and floor contractor	2,287
Floor coverings	234
Other building construction	86
Total construction	**$5,493,201**
Professional Services	
Engineering	$455,373
Environmental services and transportation planning	154,353
Architectural and design services	29,949
Business services and consulting	28,530
Surveying and mapmaking	21,348
Testing services	8,674
Computer systems and services	5,853
IT and data services	5,493
Human resources and job training services	5,341
Medical testing, laboratories, and pharmaceutical services	5,175
Construction management	5,126
Other professional services	4,154
Finance and accounting	3,394
Advertising, marketing, and public relations	1,162
Total professional services	**$733,925**
Goods and Support Services	
Industrial chemicals	$69,269
Automobiles	62,429
Petroleum and petroleum products	24,504
Other services	19,266
Printing and copying	10,193
Vehicle parts and supplies	8,835
Other goods	5,646
Furniture	1,529
Office equipment	1,420
Communications equipment	1,177
Security services	855
Cleaning and janitorial supplies	370
Cleaning and janitorial services	342
Farm and garden equipment and supplies	331
Office supplies	152
Security guard services	55
Total goods and support services	**$206,372**
Total	**$6,433,498**

- INDOT awarded to universities, government agencies, or other nonprofit organizations ($1.4 billion of associated contract dollars);[8]
- Were classified in subindustries which often include property purchases, leases, or other pass-through dollars (e.g., real estate or legal services) ($29 million of associated contract dollars);
- Were classified in subindustries that are not typically included in a disparity study and also account for small proportions of INDOT'S contracting dollars ($17 million of associated contract dollars);[9]
- Represented payments to individuals ($4 million of associated contract dollars); or
- Could not be classified into a particular subindustry ($5 million of associated contract dollars).

F. Collection of Bid and Proposal Data

BBC conducted a case study analysis of bids and proposals for a sample of contracts that INDOT awarded during the study period. INDOT provided documents related to bid, proposal, and other related information to the BBC study team for those contracts. BBC successfully collected and examined bid and proposal information for a sample of 153 construction, 39 professional services, and seven procurement contracts that INDOT awarded during the study period. For details about the case study analysis, see Chapter 8.

G. Agency Review Process

INDOT reviewed BBC's prime contract and subcontract data several times during the study process. The BBC study team met with INDOT staff to review the data collection process, information that the study team gathered, and summary results. INDOT staff also reviewed contract and vendor information. BBC incorporated INDOT's feedback in the final contract and vendor data that the study team used as part of the disparity study.

---

[8] IDOA certifies a small number of nonprofit organizations as MBE/WBEs. MBE/WBE-certified nonprofit organizations perform work in a few specialized industries. BBC included nonprofit organizations that perform work in those industries in its analyses.

[9] Examples of industries not typically included in a disparity study include retail stores, farms, and miscellaneous goods purchases.

CHAPTER 5.
Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of minority- and woman-owned businesses that are ready, willing, and able to perform on Indiana Department of Transportation (INDOT) construction; professional services; and goods and support services prime contracts and subcontracts. Chapter 5 describes the availability analysis in seven parts:

A. Purpose of the availability analysis;

B. Potentially available businesses;

C. Businesses in the availability database;

D. Availability calculations;

E. Availability results;

F. Base figure for overall DBE goal; and

G. Implications for DBE contract goals.

Appendix C provides supporting information related to the availability analysis.

A. Purpose of the Availability Analysis

BBC examined the availability of minority- and woman-owned businesses for INDOT prime contracts and subcontracts to inform the agency's efforts to comply with the State of Indiana's Minority and Women's Business Enterprises (MBE/WBE) Program as well as the agency's implementation of the Federal Disadvantaged Business Enterprise (DBE) Program. In addition, BBC used availability analysis results as inputs in the disparity analysis. In the disparity analysis, BBC compared the percentage of INDOT contract dollars that went to minority- and woman-owned businesses during the study period (i.e., utilization) to the percentage of dollars that one might expect those businesses to receive based on their availability for specific types and sizes of INDOT prime contracts and subcontracts (i.e., availability). Comparisons between utilization and availability allowed the study team to determine whether any minority- or woman-owned business groups were underutilized during the study period relative to their availability for INDOT work (for details, see Chapter 7).

B. Potentially Available Businesses

BBC's availability analysis focused on specific areas of work (i.e., subindustries) related to the types of construction; professional services; and goods and support services prime contracts and subcontracts that INDOT awarded during the study period. BBC began the availability analysis by identifying the specific subindustries in which INDOT spends the majority of its contracting dollars (for details, see Chapter 4) as well as the geographic areas in which the majority of the businesses with which INDOT spends those contracting dollars are located (i.e., the *relevant geographic market area,* which BBC identified as the entire state of Indiana). The study team then developed a database of potentially available businesses through surveys

with businesses located in the relevant geographic market area that do work within relevant subindustries. That method of examining availability is sometimes referred to as a *custom census* and has been accepted in federal court as a valid methodology for conducting availability analyses. Figure 5-1 summarizes the strengths of BBC's custom census approach.

Figure 5-1.
Summary of BBC's custom census availability approach

Federal courts have reviewed and upheld custom census approaches to conducting availability analyses. Compared with other court-reviewed approaches, BBC's approach adds several layers of screening to determine which businesses are potentially available for work in relevant industries and subindustries. For example, BBC collects detailed information from businesses about their roles as contractors, their interest in local government work, and the geographic locations of their work—items not included in some previous court-reviewed availability analyses. BBC also analyzes the sizes of contracts and subcontracts on which businesses have bid on or performed in the past to determine the *relative capacity* of businesses.

Overview of availability surveys. The study team conducted telephone surveys with business owners and managers to identify Indiana businesses that are potentially available for INDOT construction; professional services; and goods and support services prime contracts and subcontracts.[1] BBC began the survey process by collecting information about business establishments from Dun & Bradstreet (D&B) Marketplace.[2] BBC collected information about all business establishments listed under 8-digit work specialization codes (as developed by D&B) that were most related to the contracts that INDOT awarded during the study period. BBC obtained listings on 27,384 Indiana businesses that do work related to those work specializations. However, 6,185 of those business listings did not include a working phone number. BBC attempted availability surveys with the remaining 21,199 business establishments.

Availability survey information. BBC worked with Engaging Solutions to conduct telephone surveys with the owners or managers of the identified business establishments. Survey questions covered many topics about each business, including:

- Status as a private business (as opposed to a public agency or nonprofit organization);[3]
- Status as a subsidiary or branch of another company;
- Primary lines of work;
- Qualifications and interest in performing work for INDOT or other local government entities;
- Qualifications and interest in performing work as a prime contractor or as a subcontractor;
- Largest prime contract or subcontract bid on or performed in the previous five years;

[1] The study team offered business representatives the option of completing surveys via fax or e-mail if they preferred not to complete surveys via telephone.

[2] D&B Marketplace is accepted as the most comprehensive and complete source of business listings in the nation.

[3] The Indiana Department of Administration certifies a small number of nonprofit organizations as MBE/WBEs. MBE/WBE-certified nonprofit organizations perform work in a few specialized industries. BBC included nonprofit organizations that perform work in those industries in its analyses.

- Year of establishment; and
- Race/ethnicity and gender of ownership.

Appendix C provides details about specific survey questions and an example of the availability survey instrument.

Potentially available businesses. BBC considered businesses to be potentially available for INDOT prime contracts or subcontracts if they reported having a location in Indiana and reported possessing *all* of the following characteristics:

- Being a private business (as opposed to a nonprofit organization);
- Having performed work relevant to INDOT construction; professional services; or goods and support services contracting;
- Having bid on or performed construction; professional services; or goods and support services prime contracts or subcontracts in either the public or private sector in Indiana in the past five years;
- Being able to perform work or serve customers in the geographical area in which the work took place; and
- Being qualified for and interested in work for INDOT or other state or local government entities.[4]

BBC also considered the following information about businesses to determine if they were potentially available for specific contracts that INDOT awarded during the study period:

- The largest contract they bid on or performed in the past five years; and
- The year in which they were established.

C. Businesses in the Availability Database

After conducting availability surveys with thousands of local businesses, the study team developed a database of information about businesses that are potentially available for INDOT construction; professional services; and goods and support services contracting work. Information from the database allowed BBC to develop a representative depiction of businesses that are ready, willing, and able to perform work for INDOT. Figure 5-2 presents the percentage of businesses in the study team's *availability database* that were minority- or woman-owned. The information in Figure 5-2 reflects a simple *head count* of businesses with no analysis of their availability for specific INDOT contracts. Thus, it represents only a first step toward analyzing the availability of minority- and woman-owned businesses for INDOT work. The study team's analysis included 1,366 businesses that are potentially available for specific construction; professional services; and goods and support services contracts that INDOT awarded during the study period. As shown in Figure 5-2, of those businesses, 28 percent were minority- or woman-owned.

[4] That information was gathered separately for prime contract and subcontract work.

Figure 5-2.
Percentage of businesses in the availability database that were minority- or woman-owned

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source:

BBC Research & Consulting availability analysis.

Race/Ethnicity and Gender	Percent of Firms
Black American-owned	5.9 %
Asian Pacific American-owned	0.6
Subcontinent Asian American-owned	1.1
Hispanic American-owned	1.9
Native American-owned	0.3
Other	0.1
Total minority-owned	**9.8 %**
White woman-owned	18.2 %
Total minority-/woman-owned	**28.0 %**
Total majority-owned	72.0 %
Total firms	**100.0 %**

D. Availability Calculations

BBC analyzed information from the availability database to develop dollar-weighted estimates of the availability of minority- and woman-owned businesses for INDOT contracting work. Those estimates represent the percentage of INDOT construction; professional services; and goods and support services contracting dollars that minority- and woman-owned businesses would be expected to receive based on their availability for specific types and sizes of INDOT prime contracts and subcontracts.

Steps to calculating availability. BBC used a bottom up, contract-by-contract *matching* approach to calculate availability. Only a portion of the businesses in the availability database was considered potentially available for any given INDOT prime contract or subcontract. BBC first examined the characteristics of each specific prime contract or subcontract (referred to generally as a *contract element*), including type of work, location of work, contract size, and contract date. BBC then identified businesses in the availability database that perform work of that type, in that role (i.e., as a prime contractor or subcontractor), in that location, of that size, and that were in business in the year that INDOT awarded the contract element.

BBC identified the specific characteristics of each prime contract and subcontract that the study team examined as part of the disparity study and then took the following steps to calculate availability for each contract element:

1. For each contract element, the study team identified businesses in the availability database that reported that they:
   - Are qualified and interested in performing construction; professional services; or good and support services work in that particular role for that specific type of work for INDOT;
   - Are able to serve customers in the geographical area in which the work took place;
   - Have bid on or performed work of that size in the past five years; and
   - Were in business in the year that INDOT awarded the contract.

2. The study team then counted the number of minority-owned businesses (separately by race/ethnicity), white woman-owned businesses, and businesses owned by non-Hispanic white men in the availability database that met the criteria specified in Step 1.

3. The study team translated the numeric availability of businesses for the contract element into percentage availability.

BBC repeated those steps for each contract element that the study team examined as part of the disparity study. BBC multiplied the percentage availability for each contract element by the dollars associated with the contract element, added results across all contract elements, and divided by the total dollars for all contract elements. The result was dollar-weighted estimates of the availability of minority- and woman-owned businesses, both overall and separately for each racial/ethnic and gender group. Figure 5-3 provides an example of how BBC calculated availability for a specific subcontract associated with a construction prime contract that INDOT awarded during the study period.

Improvements on a simple head count of businesses. BBC used a custom census approach to calculating the availability of minority- and woman-owned businesses for INDOT work rather than using a simple *head count* of minority- and woman-owned businesses (e.g., simply calculating the percentage of all local construction; professional services; and goods and support services businesses that are minority- or woman-owned). There are several important ways in which BBC's custom census approach to measuring availability is more precise than completing a simple head count.

BBC's approach accounts for type of work. Federal regulations suggest calculating availability based on businesses' abilities to perform specific types of work. For example, the United States Department of Transportation (USDOT) gives the following example in "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program:"

Figure 5-3.
Example of an availability calculation for an INDOT subcontract

On a contract that INDOT awarded in 2012, the prime contractor awarded a subcontract worth $43,828 for concrete work. To determine the overall availability of minority- and woman-owned businesses for that subcontract, the study team identified businesses in the availability database that:

a. Were in business in 2012;
b. Indicated that they performed concrete work;
c. Reported bidding on work of similar or greater size in the past;
d. Reported being able to work or serve customers in the geographical area where the contract was performed; and
e. Reported qualifications and interest in working as a subcontractor on INDOT or other local entity projects.

The study team found 23 businesses in the availability database that met those criteria. Of those businesses, five were minority- or woman-owned businesses. Thus, the availability of minority- and woman-owned businesses for the subcontract was 22 percent (i.e., 5/23 X 100 = 22).

> *If 90 percent of an agency's contracting dollars is spent on heavy construction and 10 percent on trucking, the agency would calculate the percentage of heavy construction businesses that are [minority- or woman-owned] and the percentage of trucking*

businesses that are [minority- or woman-owned], and weight the first figure by 90 percent and the second figure by 10 percent when calculating overall [minority- and woman-owned business] availability.[5]

The BBC study team took type of work into account by examining 58 different subindustries related to construction; professional services; and goods and support services as part of estimating availability for INDOT prime contracts and subcontracts.

BBC's approach accounts for qualifications and interest in relevant prime contract and subcontract work. The study team collected information on whether businesses are qualified and interested in working as prime contractors, subcontractors, or both on INDOT construction; professional services; and goods or support services work (in addition to considering several other factors related to INDOT prime contracts and subcontracts such as contract types, sizes, and locations):

- Businesses that reported being qualified for and interested in working as prime contractors were counted as available for prime contracts;
- Businesses that reported being qualified for and interested in working as subcontractors were counted as available for subcontracts; and
- Businesses that reported being qualified for and interested in working as both prime contractors and subcontractors were counted as available for both prime contracts and subcontracts.

BBC's approach accounts for the relative capacity of businesses. BBC considered the size—in terms of dollar value—of the prime contracts and subcontracts that a business bid on or received in the previous five years (i.e., *relative capacity*) when determining whether to count that business as available for a particular contract element. BBC considered whether businesses had previously bid on or received at least one contract of an equivalent or greater dollar value. BBC's approach is consistent with many recent, key court decisions that have found relative capacity measures to be important to measuring availability (e.g., *Associated General Contractors of America, San Diego Chapter vs. California Department of Transportation, et al.*,[6] *Western States Paving Company v. Washington State DOT*,[7] *Rothe Development Corp. v. U.S. Department of Defense*,[8] and *Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County*[9]).

As part of the disparity study, BBC used regression analysis to examine whether the relative capacity of minority- and woman-owned businesses differs from that of business owned by non-Hispanic white men after accounting for various other factors. That analysis indicated that the

---

[5] Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program, http://www.osdbu.dot.gov/dbeprogram/tips.cfm.

[6] *AGC, San Diego Chapter v. California DOT*, 2013 WL 1607239 (9th Cir. April 16, 2013).

[7] *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

[8] *Rothe Development Corp. v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

[9] *Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996).

capacity of minority- and woman-owned businesses was not depressed relative to that of business owned by non-Hispanic white men after accounting for differences in industry and age of businesses.

BBC's approach generates dollar-weighted results. BBC examined availability on a contract-by-contract basis and then dollar-weighted the results for different sets of contract elements. Thus, the results of relatively large contract elements contributed more to overall availability estimates than those of relatively small contract elements. BBC's approach is consistent with relevant case law and federal regulations including USDOT's "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program," which suggests a dollar-weighted approach to calculating availability.

E. Availability Results

BBC estimated the availability of minority- and woman-owned businesses for the 21,186 construction; professional services; and goods and support services prime contracts and subcontracts that INDOT awarded between July 1, 2009 and June 30, 2013. Figure 5-4 presents overall dollar-weighted availability estimates by racial/ethnic and gender group for those contracts.

Figure 5-4.
Overall dollar-weighted availability estimates by racial/ethnic and gender group

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail and results by group, see Figure F-2 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Race/Ethnicity and Gender	Utilization Benchmark (Availability %)
Black American-owned	1.7 %
Asian Pacific American-owned	0.2
Subcontinent Asian American-owned	0.6
Hispanic American-owned	0.7
Native American-owned	0.2
Total minority-owned	**3.3 %**
White woman-owned	8.2 %
Total minority-/woman-owned	**11.5 %**

Overall, the availability of minority- and woman-owned businesses for INDOT construction; professional services; and goods and support services contracts is 11.5 percent. White woman-owned businesses (8.2%) and Black American-owned businesses (1.7%) exhibited the highest availability percentages among all groups. Note that availability estimates varied when the study team examined different subsets of those contracts (for availability results for specific contract sets, see Appendix F). Assuming that the mix of the types, sizes, and locations of the contracts that INDOT awards in the future are similar to that of the contracts that the agency awarded during the study period, one might expect 11.5 percent of INDOT's contracting dollars to go to minority- and woman-owned businesses based on their availability for that work.

F. Base Figure for Overall DBE Goal

Establishing a base figure is the first step in calculating an overall goal for DBE participation in INDOT's Federal Highway Administration (FHWA)-funded transportation contracts.[10] BBC

[10] BBC considered a contract to be FHWA-funded if it included at least one dollar of FHWA funding.

calculated the base figure using the same availability database and approach described above except that calculations only included *potential DBEs*—that is, minority- and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 Code of Federal Regulations Part 26, regardless of actual certification—and only included FHWA-funded prime contracts and subcontracts. BBC's approach to calculating INDOT's base figure is consistent with:

- Court-reviewed methodologies in several states including Washington, California, Illinois, and Minnesota;
- Instructions in The Final Rule effective February 20, 2011 that outline revisions to the Federal DBE Program; and
- USDOT's "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program."

BBC's availability analysis indicates that the availability of potential DBEs for INDOT's FHWA-funded transportation contracts is 10.8 percent. INDOT might consider 10.8 percent as the base figure for its overall goal for DBE participation, assuming that the types, sizes, and locations of FHWA-funded contracts that the agency awards in the time period that the goal will cover are similar to the types of FHWA-funded contracts that the agency awarded during the study period. For details about INDOT's base figure for its overall DBE goal, see Chapter 9.

Differences from overall MBE/WBE availability. The availability of potential DBEs for FHWA-funded contracts is slightly less than the overall availability of minority- and woman-owned businesses that is presented in Figure 5-4. BBC's calculation of the overall availability of minority- and woman-owned businesses includes three groups of minority- and woman-owned businesses that the study team did not count as potential DBEs when calculating the base figure:

- Minority- and woman-owned businesses that graduated from the DBE Program (that were not recertified);
- Minority- and woman-owned businesses that are not currently DBE-certified but that applied for DBE certification with INDOT and have been denied; and
- Minority- and woman-owned businesses that are not currently DBE-certified that reported annual revenues over the most recent three years that were so high as to deem them ineligible for DBE certification.

In addition, the study team's analyses for calculating the base figure for FHWA-funded contracts only included FHWA-funded prime contracts and subcontracts. The calculations for the overall availability of minority- and woman-owned businesses included both FHWA- and state-funded transportation prime contracts and subcontracts.

Additional steps before INDOT determines its overall DBE goal. INDOT must consider whether to make a step-2 adjustment to the base figure as part of determining its overall DBE goal. Step-2 adjustments can be upward or downward, but there is no requirement for INDOT to make a step-2 adjustment as long as the agency can explain what factors it considered and why no adjustment was warranted. Chapter 9 discusses factors that INDOT might consider in deciding whether to make a step-2 adjustment to the base figure.

G. Implications for Any DBE Contract Goals

If INDOT determines that the use of DBE contract goals is appropriate in the future, it might use information from the availability analysis when setting any contract-specific DBE goals. It might also use information from a current DBE directory, a current bidders list, or other sources that could provide information about the availability of minority- and woman-owned businesses to participate in particular contracts. The Federal DBE Program provides agencies that use DBE contract goals with some flexibility in how they set those goals. DBE goals on some contracts might be higher than the overall DBE goal. DBE goals on other contracts might be lower than the overall DBE goal. In addition, there may be some FHWA-funded contracts for which setting DBE contract goals would not be appropriate.

CHAPTER 6.
Utilization Analysis

Chapter 6 presents information about the participation of minority- and woman-owned businesses in construction; professional services; and goods and support services contracts that the Indiana Department of Transportation (INDOT) awarded between July 1, 2009 and June 30, 2013. (Chapter 4 provides additional information about data collection and methodology related to the utilization analysis.) Chapter 6 is organized in two parts:

A. Overview of utilization analysis; and

B. Utilization analysis results.

A. Overview of Utilization Analysis

BBC Research & Consulting (BBC) measured the participation of minority- and woman-owned businesses in INDOT contracting in terms of *utilization*—the percentage of prime contract and subcontract dollars that INDOT awarded to minority- and woman-owned businesses during the study period. For example, if 5 percent of INDOT prime contract and subcontract dollars went to white woman-owned businesses on a particular set of contracts, utilization of white woman-owned businesses for that set of contracts would be 5 percent.[1] The study team measured the participation of all minority- and woman-owned businesses regardless of certification and separately of minority- and woman-owned businesses that were certified as Disadvantaged Business Enterprises (DBEs) through INDOT.

The United States Department of Transportation (USDOT) requires INDOT to submit reports about the participation of DBEs in its Federal Highway Administration (FHWA)-funded transportation contracts twice each year (typically in June and December). BBC's analysis of the participation of minority- and woman-owned businesses in INDOT contracting goes beyond what the agency currently reports to USDOT. Two key differences are that:

- BBC counts all minority- and woman-owned businesses in its analysis, not only certified DBEs; and
- BBC examines both FHWA- and state-funded contracts, not only FHWA-funded contracts.

All minority- and woman-owned business, not only certified DBEs. Per USDOT regulations, INDOT prepares DBE utilization reports for FHWA based on information only about certified DBEs. INDOT does not track the utilization of minority- and woman-owned businesses that are not DBE-certified for those reports. In contrast, BBC's utilization analysis includes the participation of *all* minority- and woman-owned businesses, regardless of whether they are certified as DBEs (and regardless of whether they are certified as minority- or woman-owned

[1] BBC uses the term "white woman-owned businesses" to refer to "non-Hispanic white woman-owned businesses."

business enterprises through the Indiana Department of Administration). The study team included minority- and woman-owned businesses that:

- Are currently DBE-certified;
- May have once been DBE-certified and graduated (or let their certifications lapse); and
- Are not eligible for certification or have never been certified.

BBC provides utilization results for all minority- and woman-owned businesses and separately for minority- and woman-owned businesses that were DBE-certified during the study period.[2]

FHWA- and state-funded contracts. USDOT requires INDOT to prepare DBE participation reports only for its FHWA-funded transportation contracts. Thus, INDOT reports the participation of certified DBEs only for those contracts. In contrast, BBC analyzed the participation of minority- and woman-owned businesses in both FHWA- and state-funded INDOT contracts.

B. Utilization Analysis Results

Figure 6-1 presents the overall percentage of contracting dollars that minority- and woman-owned businesses received on construction; professional services; and goods and support services contracts that INDOT awarded during the study period (including both prime contracts and subcontracts). The darker portion of the bar represents the percentage of contracting dollars that certified DBEs received during the study period.

Figure 6-1.
Participation of minority- and woman-owned businesses

Notes:

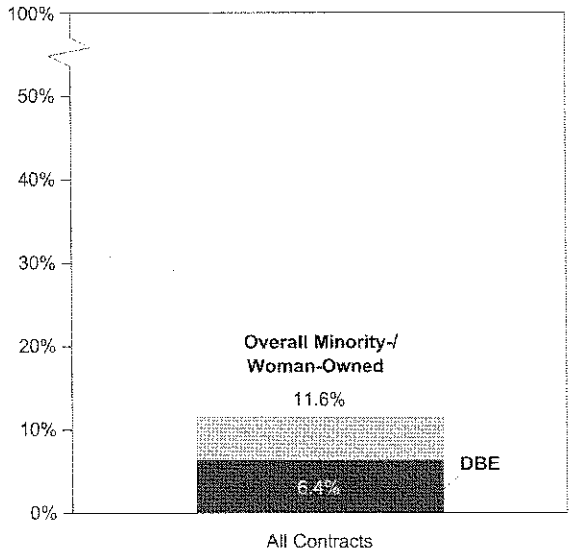
The study team analyzed 21,186 prime contracts and subcontracts.

The darker portion of the bar represents participation of certified DBEs.

For more detail, see Figure F-2 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.



[2] Although businesses that are owned and operated by socially- and economically-disadvantaged non-Hispanic white men can become certified as DBEs, BBC identified no DBE-certified businesses that were owned by non-Hispanic white men that participated on INDOT contracts during the study period. In other words, all DBEs that participated on INDOT contracts during the study period were minority- or woman-owned. Thus, utilization results for certified DBEs are a subset of the utilization results for all minority- and woman-owned businesses.

As shown in Figure 6-1, overall, minority- and woman-owned businesses received 11.6 percent of the relevant contracting dollars that INDOT awarded during the study period. The darker portion of the bar shows that the majority of those contracting dollars—6.4 percent—went to certified DBEs. In addition, BBC examined participation in INDOT contracting separately for each relevant racial/ethnic and gender group. Those results are presented in Figure 6-2. Overall, Black American-owned businesses, Native American-owned businesses, and white woman-owned businesses exhibited higher levels of participation on INDOT contracts than all other groups (1.4% for Black American-owned businesses, 1.3% for Native American-owned businesses, and 7.4% for woman-owned businesses).

Figure 6-2.
Participation of minority- and woman-owned businesses by group

Note:

The study team analyzed 21,186 prime contracts and subcontracts.

Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals.

For more detail, see Figure F-2 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

	Total	
	$ in Thousands	Percent
Minority- and woman-owned		
Black American-owned	$92,734	1.4 %
Asian Pacific American-owned	44,669	0.7
Subcontinent Asian American-owned	24,630	0.4
Hispanic American-owned	22,787	0.4
Native American-owned	86,579	1.3
White woman-owned	475,636	7.4
Total minority- and woman-owned	**$747,035**	**11.6 %**
Majority-owned	$5,686,464	88.4 %
Total	**$6,433,498**	**100.0 %**
DBEs		
Black American-owned	$69,165	1.1 %
Asian Pacific American-owned	20,663	0.3
Subcontinent Asian American-owned	6,851	0.1
Hispanic American-owned	7,179	0.1
Native American-owned	12,079	0.2
White woman-owned	294,720	4.6
Total DBE	**$410,658**	**6.4 %**
Non-DBE	$6,022,841	93.6 %
Total	**$6,433,498**	**100.0 %**

Further analysis revealed that, in many cases, a relatively small number of businesses accounted for relatively large percentages of minority- and woman-owned business participation in INDOT contracting during the study period:

- A Black American-owned structural steel business received 49 percent of the total dollars that went to Black American-owned businesses (approximately $46 million of $93 million);
- An Asian Pacific American-owned landscaping business received 40 percent of the total dollars that went to Asian Pacific American-owned businesses (approximately $18 million of $45 million);
- A Subcontinent Asian American-owned architecture business received 56 percent of the total dollars that went to Subcontinent Asian American-owned businesses (approximately $14 million of $25 million);

- A Hispanic American-owned business services company received 43 percent of the total dollars that went to Hispanic American-owned businesses (approximately $10 million of $23 million); and
- A Native American-owned water, sewer, and utility line contractor received 85 percent of the total dollars that went to Native American-owned businesses (approximately $74 million of $87 million).

Information about the participation of minority- and woman-owned businesses is instructive on its own, but it is even more instructive when it is compared with the participation that one might expect based on the availability of minority- and woman-owned businesses for INDOT work. BBC presents such comparisons as part of the disparity analysis in Chapter 7.

CHAPTER 7.
Disparity Analysis

The disparity analysis compared the participation of minority- and woman-owned businesses on contracts that the Indiana Department of Transportation (INDOT) awarded between July 1, 2009 and June 30, 2013 (i.e., the study period) to what those businesses might be expected to receive based on their availability for that work. The analysis focused on construction; professional services; and goods and support services contracts. Chapter 7 presents the disparity analysis in three parts:

A. Overview of disparity analysis;

B. Overall disparity analysis results; and

C. Statistical significance of disparity analysis results.

A. Overview of Disparity Analysis

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation of minority- and woman-owned businesses in INDOT prime contracts and subcontracts with the percentage of contract dollars that minority- and woman-owned businesses might be expected to receive based on their availability for that work. BBC made those comparisons for each relevant racial/ethnic and gender group. BBC reports disparity analysis results for all INDOT contracts considered together and separately for different sets of contracts (e.g., prime contracts and subcontracts).

BBC expressed both actual participation and availability as percentages of the total dollars associated with a particular set of contracts, making them directly comparable (e.g., 5% participation compared with 4% availability). BBC then calculated a *disparity index* to help compare participation and availability results across relevant racial/ethnic and gender groups and across different sets of contracts. A disparity index of 100 indicates a match between actual participation and availability (referred to as *parity*).

Figure 7-1.
Calculation of disparity indices

A disparity index provides a way of assessing how closely the actual participation of minority- and woman-owned businesses matches the percentage of contract dollars that those businesses might be expected to receive based on their availability for specific sets of contracts. One can directly compare a disparity index for one racial/ethnic or gender group to that of another group and compare disparity indices across different sets of contracts. BBC calculates disparity indices using the following formula:

$$\frac{\text{\% actual participation}}{\text{\% availability}} \times 100$$

For example, if actual participation of white woman-owned businesses on a set of contracts was 2 percent and the availability of white woman-owned businesses for those contracts was 10 percent, then the disparity index would be 2 percent divided by 10 percent, which would then be multiplied by 100 to equal 20. In this example, white woman-owned businesses would have actually received 20 cents of every dollar that they might be expected to receive based on their availability.

A disparity index of less than 100 indicates a disparity between participation and availability, and a disparity index of less than 80 is often considered *substantial*.[1] Figure 7-1 describes how BBC calculates disparity indices.

The disparity analysis results that BBC presents in Chapter 7 summarize detailed results tables provided in Appendix F. Each table in Appendix F presents disparity analysis results for a different set of INDOT contracts. For example, Figure 7-2, which is identical to Figure F-2 in Appendix F, reports disparity analysis results for *all* INDOT contracts that the study team examined as part of the study—that is, construction; professional services; and goods and support services prime contracts and subcontracts that INDOT awarded during the study period. Appendix F includes analogous tables for different subsets of contracts including those that present results separately for:

- Construction; professional services; and goods and support services contracts;
- Prime contracts and subcontracts;
- Contracts awarded in different study period years;
- Large and small prime contracts; and
- Contracts awarded in different regions in Indiana.

The heading of each table in Appendix F provides a description of the subset of contracts that the study team analyzed for that particular disparity analysis table.

A review of Figure 7-2 helps to introduce the calculations and format of all of the disparity analysis tables in Appendix F. As illustrated in Figure 7-2, the disparity analysis tables present information about each relevant racial/ethnic and gender group (as well as about all businesses) in separate rows:

- "All businesses" in row (1) pertains to information about all businesses owned by non-Hispanic white men (i.e., majority-owned businesses) and all minority- and woman-owned businesses considered together.
- Row (2) provides results for all minority- and woman-owned businesses, regardless of whether they were certified as minority- or woman-owned business enterprises (MBE/WBEs) through the Indiana Department of Administration (IDOA) or as Disadvantaged Business Enterprises (DBEs) through INDOT.
- Row (3) provides results for all white woman-owned businesses, regardless of whether they were certified as WBEs through IDOA or as DBEs through INDOT.

---

[1] Many courts have deemed disparity indices below 80 as being "substantial" and have accepted them as evidence of adverse conditions for minority- and woman-owned businesses (e.g., see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng'g Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); and *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994). See Appendix B for additional discussion of those and other cases.

Figure 7-2.
Example of a disparity analysis table from Appendix F (same as Figure F-2 in Appendix F)

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	21,186	$6,433,498	$6,433,498				
(2) Minority- and woman-owned	6,569	$747,035	$747,035	11.6	11.5	0.1	100.7
(3) White woman-owned	4,779	$475,636	$475,636	7.4	8.2	-0.8	90.2
(4) Minority-owned	1,790	$271,399	$271,399	4.2	3.3	0.9	126.3
(5) Black American-owned	490	$92,529	$92,734	1.4	1.7	-0.2	87.0
(6) Asian Pacific American-owned	656	$44,570	$44,669	0.7	0.2	0.4	200+
(7) Subcontinent Asian American-owned	306	$24,576	$24,630	0.4	0.6	-0.2	66.4
(8) Hispanic American-owned	212	$22,736	$22,787	0.4	0.7	-0.3	53.5
(9) Native American-owned	114	$86,387	$86,579	1.3	0.2	1.1	200+
(10) Unknown minority-owned	12	$601					
(11) DBE-certified	4,244	$410,658	$410,658	6.4			
(12) White woman-owned DBE	3,399	$294,720	$294,720	4.6			
(13) Minority-owned DBE	845	$115,937	$115,937	1.8			
(14) Black American-owned DBE	361	$69,160	$69,165	1.1			
(15) Asian Pacific American-owned DBE	158	$20,662	$20,663	0.3			
(16) Subcontinent Asian American-owned DBE	154	$6,850	$6,851	0.1			
(17) Hispanic American-owned DBE	147	$7,179	$7,179	0.1			
(18) Native American-owned DBE	23	$12,078	$12,079	0.2			
(19) Unknown minority-owned DBE	2	$9					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting disparity analysis.

- Row (4) provides results for all minority-owned businesses, regardless of whether they were certified as MBEs through IDOA or as DBEs through INDOT.
- Rows (5) through (10) provide results for businesses of each individual minority group, regardless of whether they were certified as MBEs through IDOA or as DBEs through INDOT.

The bottom half of Figure 7-2 presents utilization results for businesses that were certified as DBEs through INDOT. BBC does not report availability or disparity analysis results separately for certified businesses.

Utilization results. Each disparity analysis table includes the same columns and rows:

- Column (a) presents the total number of prime contracts and subcontracts (i.e., contract elements) that the study team analyzed as part of the contract set. As shown in row (1) of column (a) of Figure 7-2, the study team analyzed 21,186 contract elements. The value presented in column (a) for each individual racial/ethnic and gender group represents the number of contract elements in which businesses of that particular group participated (e.g., as shown in row (5) of column (a), Black American-owned businesses participated in 490 prime contracts and subcontracts).
- Column (b) presents the dollars (in thousands) that were associated with the set of contract elements. As shown in row (1) of column (b) of Figure 7-2, the study team examined approximately $6.4 billion for the entire set of contract elements. The dollar totals include both prime contract and subcontract dollars. The value presented in column (b) for each individual racial/ethnic and gender group represents the dollars that the businesses of that particular group received on the set of contract elements (e.g., as shown in row (5) of column (b), Black American-owned businesses received $93 million).
- Column (c) presents the dollars (in thousands) that were associated with the set of contract elements after adjusting those dollars for businesses that the study team identified as minority-owned or as DBEs, but for which specific race/ethnicity information was not available. The dollar totals include both prime contract and subcontract dollars.
- Column (d) presents the utilization percentage of each racial/ethnic and gender group as a percentage of total dollars associated with the set of contract elements. The study team calculated each percentage in column (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c), and then expressing the result as a percentage (e.g., for Black American-owned businesses, the study team divided $93 million by $6.4 billion and multiplied by 100 for a result of 1.4%, as shown in row (5) of column (d)).

Availability results. Column (e) of Figure 7-2 presents the availability of each relevant racial/ethnic and gender group for all contract elements that the study team analyzed as part of the contract set. Availability estimates, which are represented as a percentage of the total contracting dollars associated with the set of contracts, serve as benchmarks against which to compare utilization results for specific groups for specific sets of contracts (e.g., as shown in row (5) of column (e), the availability of Black American-owned businesses is 1.7%).

Differences between utilization and availability. The next step in analyzing whether there was a disparity between the participation and availability of minority- and woman-owned businesses is to subtract the utilization percentage from the availability percentage. Column (f) of Figure 7-2 presents the percentage point difference between utilization and availability for each relevant racial/ethnic and gender group. For example, as presented in row (5) of column (f) of Figure 7-2, the participation of Black American-owned businesses in INDOT contracts was 0.2 percentage points less than their availability.

Disparity indices. It is sometimes difficult to interpret absolute percentage differences between participation and availability. Therefore, BBC also calculated a disparity index for each relevant racial/ethnic and gender group, which measured actual participation relative to availability and served as a metric to compare any disparities across different groups and different sets of contracts. BBC calculated disparity indices by dividing the utilization percentage for each group by the availability percentage for each group and multiplying by 100. Smaller disparity indices indicate greater disparities (i.e., a greater degree of underutilization).

Column (g) of Figure 7-2 presents the disparity index for each relevant racial/ethnic and gender group. For example, as reported in row (5) of column (g), the disparity index for Black American-owned businesses was approximately 87, indicating that Black American-owned businesses actually received approximately $0.87 for every dollar that they might be expected to receive based on their availability for prime contracts and subcontracts that INDOT awarded during the study period.

BBC applied the following rules when disparity indices were exceedingly large or could not be calculated because the study team did not identify any businesses of a particular group as available for a particular set of contract elements:

- When BBC's calculations showed a disparity index exceeding 200, BBC reported an index of "200+." A disparity index of 200+ means that participation was more than twice as much as availability for a particular group for a particular set of contracts.
- When there was no participation and no availability for a particular group for a particular set of contracts, BBC reported a disparity index of "100," indicating parity.
- When participation for a particular group for a particular set of contracts was greater than 0 percent but availability was 0 percent, BBC reported a disparity index of "200+."[2]

B. Overall Disparity Analysis Results

BBC used the disparity analysis results from Figure 7-2 to assess any disparities between the participation of minority- and woman-owned businesses in prime contracts and subcontracts that INDOT awarded during the study period and their availability for that work. Figure 7-3 presents disparity indices for all relevant racial/ethnic and gender groups considered together and separately for each group. The line down the center of the graph shows a disparity index

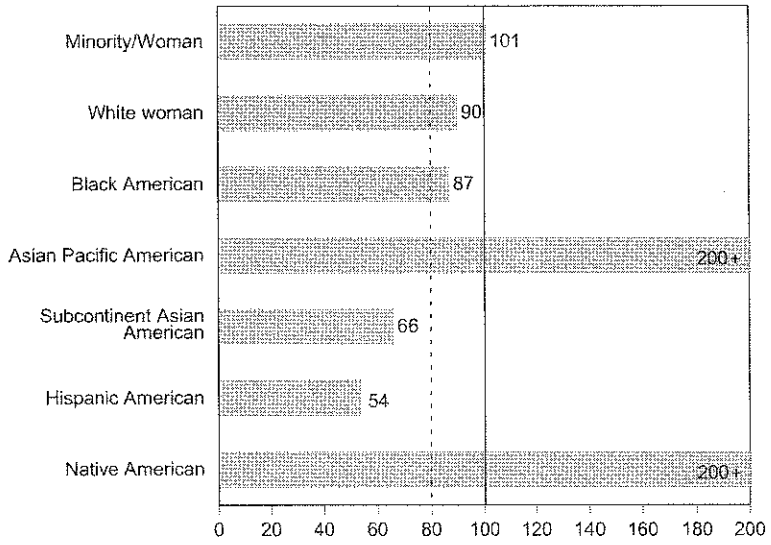
[2] A particular racial/ethnic or gender group could show a utilization percentage greater than 0 percent but an availability percentage of 0 percent for many reasons including the fact that one or more businesses that participated in INDOT contracts during the study period were out of business at the time that BBC conducted availability surveys.

level of 100, which indicates parity between participation and availability. Disparity indices less than 100 indicate disparities between participation and availability (i.e., underutilization). For reference, a line is also drawn at a disparity index level of 80, because some courts use 80 as a threshold for what indicates a substantial disparity.

Figure 7-3.
Disparity indices by group

Note:
The study team analyzed 21,186 prime contracts/subcontracts.
For more detail, see Figure F-2 in Appendix F.

Source:
BBC Research & Consulting disparity analysis.



As shown in Figure 7-3, overall, the participation of minority- and woman-owned businesses in contracts that INDOT awarded during the study period was largely in line with what one might expect based on the availability of those businesses for that work. The disparity index of 101 indicates that minority- and woman-owned businesses considered together received approximately $1.01 for every dollar that they might be expected to receive based on their availability for the prime contracts and subcontracts that INDOT awarded during the study period. However, a number of groups exhibited disparity indices below parity.

- Two groups exhibited disparity indices substantially below parity—Subcontinent Asian American-owned businesses (disparity index of 66) and Hispanic American-owned businesses (disparity index of 54).
- Two groups exhibited disparity indices below parity—Black American-owned businesses (disparity index of 87) and white woman-owned businesses (disparity index of 90)—but those disparities did not reach the threshold of what is considered substantial.
- Two groups did not exhibit disparity indices below parity—Asian Pacific American-owned businesses (disparity index of 200+) and Native American-owned businesses (disparity index of 200+).

INDOT applied DBE or MBE/WBE contract goals to most of the construction and professional services contracts that it awarded during the study period, so the disparity analysis results shown in Figure 7-3 are largely reflective of the use of those measures. It is instructive to examine whether disparities exist for minority- or woman-owned businesses for contracts that INDOT awarded in a *race- and gender-neutral environment*— that is, for contracts to which neither DBE nor MBE/WBE contract goals applied. During the study period, INDOT did not apply DBE or MBE/WBE contract goals to many of the contracts that it awarded. Figure 7-4 presents

disparity analysis results separately for contracts to which goals applied (*goals contracts*) and contracts to which goals did not apply (*no-goals contracts*).

Figure 7-4.
Disparity indices for goals contracts and no-goals contracts

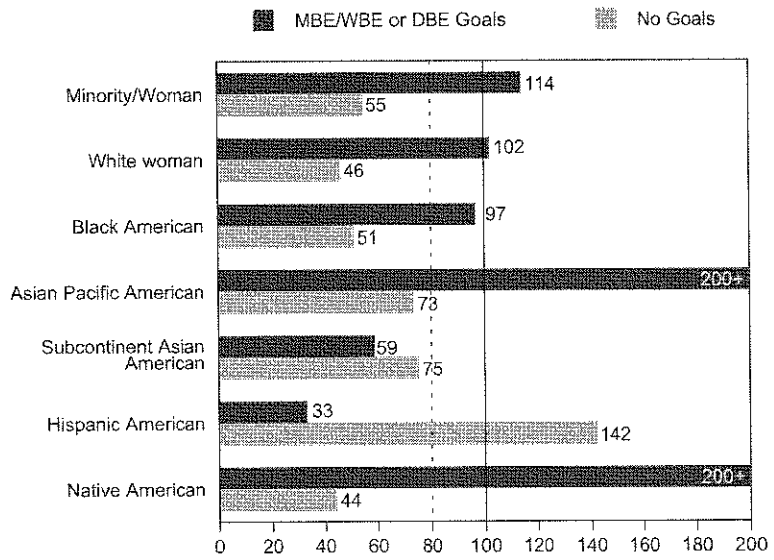
Note:

The study team analyzed 13,567 goals contracts and 7,619 no-goals contracts.

For more detail, see Figures F-15 and F-16 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



As shown in Figure 7-4, minority- and woman-owned businesses considered together exhibited a substantial disparity on no-goals contracts (disparity index of 55) but did not exhibit a disparity on goals contracts (disparity index of 114). In addition, when examined separately, most groups exhibited substantial disparities on no-goals contracts:

- Black American-owned businesses (disparity index of 51), Asian Pacific American-owned businesses (disparity index of 73), Subcontinent Asian American-owned businesses (disparity index of 75), Native American-owned businesses (disparity index of 44), and white woman-owned businesses (disparity index of 46) showed substantial disparities on no-goals contracts. Hispanic American-owned businesses did not show a disparity on those contracts (disparity index of 142).
- Subcontinent Asian American –owned businesses (disparity index of 59) and Hispanic American-owned businesses (disparity index of 33) showed a substantial disparity on goals contracts.

C. Statistical Significance of Disparity Analysis Results

Statistical significance tests allow researchers to test the degree to which they can reject random chance as an explanation for any observed quantitative differences. In other words, a statistically significant difference is one that one can consider to be reliable or *real*. Random chance is the factor that researchers consider most in determining the statistical significance of results that are based on population *samples*. As part of the availability analysis, BBC attempted to contact every business in the relevant geographic market area that Dun & Bradstreet (D&B) identified as doing business within relevant subindustries (for details, see Chapter 5). Attempting to contact every relevant business mitigated many of the concerns associated with random chance in population sampling as they may relate to the study team's availability estimates. In addition, the utilization analysis was based on what amounted to a population of contracts. Therefore, one

might consider any disparities between participation and availability that the study team identified to be *statistically significant*. BBC nonetheless used independent tests to assess the statistical significance of disparity analysis results to be consistent with industry standards.

Monte Carlo analysis. BBC used a computational algorithm that relies on repeated, random simulations to examine the statistical significance of disparity analysis results. That approach is referred to as a *Monte Carlo* method. The analyses that the study team completed as part of the disparity study were well-suited for using Monte Carlo analysis to test statistical significance. Monte Carlo analysis was appropriate for that purpose, because, among the contracts that INDOT awarded during the study period, there were many individual chances for businesses to win prime contracts and subcontracts, each with a different payoff (i.e., each with a different dollar value).

Figure 7-5 provides additional information about how the study team used a Monte Carlo method to test the statistical significance of disparity analysis results. It is important to note that Monte Carlo simulations may not be necessary to establish the statistical significance of results, and it may not be appropriate to use with very small populations of contracts.

Figure 7-5.
Monte Carlo Analysis

The study team began the Monte Carlo analysis by examining individual contract elements. For each contract element, BBC's availability database provided information on individual businesses that are available for that contract element based on type of work, contractor role, contract size, and location of the work. The study team assumed that each available business had an equal chance of winning that contract element. For example, the odds of a white woman-owned business receiving that contract element were equal to the number of white woman-owned businesses available for the contract element divided by the total number of businesses available for the contract element. The Monte Carlo simulation then randomly chose a business from the pool of available businesses to win the contract element.

The Monte Carlo simulation repeated the above process for all other elements in a particular set of contracts. The output of a single Monte Carlo simulation for all contract elements in the set represented simulated utilization of minority- and woman-owned businesses, by group, for that set of contract elements. The entire Monte Carlo simulation was then repeated one million times for each set of contracts. The combined output from all one million simulations represented a probability distribution of the overall utilization of minority- and woman-owned businesses if contracts were awarded randomly based on the availability of relevant businesses working in the local marketplace.

The output of the Monte Carlo simulations represents the number of simulations out of one million that produced a utilization result that was equal or below the actual observed utilization result for each racial/ethnic and group and for each set of contracts. If that number was less than or equal to 25,000 (i.e., 2.5% of the total number of simulations), then the study team considered that disparity index to be statistically significant at the 95 percent confidence level. If that number was less than or equal to 50,000 (i.e., 5.0% of the total number of simulations), then the study team considered that disparity index to be statistically significant at the 90 percent confidence level.

Results. BBC identified substantial disparities for minority- and woman-owned businesses considered together and for certain racial/ethnic and gender groups considered separately on contracts to which INDOT did not apply DBE or MBE/WBE contract goals during the study

period (for details, see Figure 7-4). Disparity analysis results on contracts to which INDOT did not apply contract goals are instructive, because they serve as indicators of outcomes for minority- and woman-owned businesses in a race- and gender-neutral contracting environment.

BBC used Monte Carlo analysis to test whether the disparities that the study team observed on no-goals contracts were statistically significant. Figure 7-6 presents results from the Monte Carlo analysis as they relate to the statistical significance of disparities that the study team observed for minority- and woman-owned businesses considered together and for minority-owned businesses and white woman-owned businesses considered separately. As shown in Figure 7-6, results from the Monte Carlo analysis indicated that disparities on no-goals contracts for minority- and woman-owned businesses considered together and for minority-owned businesses considered separately were statistically significant at the 95 percent confidence level. The disparity for white woman-owned businesses considered separately was statistically significant at the 90 percent confidence level.

Figure 7-6.
Monte Carlo simulation results for disparity analysis results

Race/Ethnicity and Gender	Disparity index	Number of simulation runs out of one million that replicated observed utilization	Probability of observed disparity occurring due to "chance"
Total minority-/woman-owned	55	0	<0.1 %
Minority-owned	46	0	<0.1 %
White woman-owned	73	37,578	3.8 %

Note: Numbers rounded to nearest tenth of 1 percent.
Numbers may not add to totals due to rounding.

Source: BBC Research & Consulting disparity analysis.

CHAPTER 8.
Further Exploration of Disparities

As presented in Chapter 7, the study team observed substantial disparities between the participation and availability of Subcontinent Asian American- and Hispanic American-owned businesses when considering all Indiana Department of Transportation (INDOT) contracts together. Moreover, the study team observed substantial disparities for most racial/ethnic and gender groups when examining contracts to which the agency did not apply Disadvantaged Business Enterprise (DBE) or minority- and woman-owned business enterprise (MBE/WBE) contract goals (Hispanic American-owned businesses were the only exception). Six areas of questions provide a framework for further exploration of the disparities that the study team observed between the participation and availability of minority- and woman-owned businesses:

A. Are there disparities for FHWA- and state-funded contracts?

B. Are there disparities for relevant contracting areas?

C. Are there disparities for prime contracts and subcontracts?

D. Are there disparities for different time periods?

E. Are there disparities for large and small prime contracts?

F. Do bid/proposal processes explain any disparities for prime contracts?

Answers to those questions may be relevant as INDOT considers how to refine its implementation of the Federal DBE Program and compliance with the State of Indiana's MBE/WBE Program. They may also help INDOT identify the specific racial/ethnic and gender groups, if any, that might be included in any future race- or gender-conscious program measures that the agency decides to use.

A. Are there Disparities for FHWA- and State-Funded Contracts?

BBC Research & Consulting (BBC) examined disparity analysis results separately for Federal Highway Administration- (FHWA-) and state-funded contracts that INDOT awarded during the study period. Comparing results between FHWA- and state-funded contracts is one way to assess the effectiveness of INDOT's implementation of the Federal DBE Program, which applies to FHWA-funded contracts, and the agency's efforts to comply with the with the State of Indiana's MBE/WBE Program, which applies to state-funded contracts. Figure 8-1 presents disparity indices for all relevant racial/ethnic and gender groups separately for FHWA- and state-funded contracts.

Overall, minority- and woman-owned businesses did not exhibit substantial disparities for FHWA-funded (disparity index of 105) or state-funded contracts (disparity index of 80):

- Black American-owned businesses (disparity index of 69), Subcontinent Asian American-owned businesses (disparity index of 65), and Hispanic American-owned businesses (disparity index of 73) exhibited substantial disparities for FHWA-funded contracts.

- Subcontinent Asian American-owned businesses (disparity index of 79), Hispanic American-owned businesses (disparity index of 4), and white woman-owned businesses (disparity index of 63) exhibited substantial disparities for state-funded contracts.

Figure 8-1.
Disparity indices for FHWA- and state-funded contracts

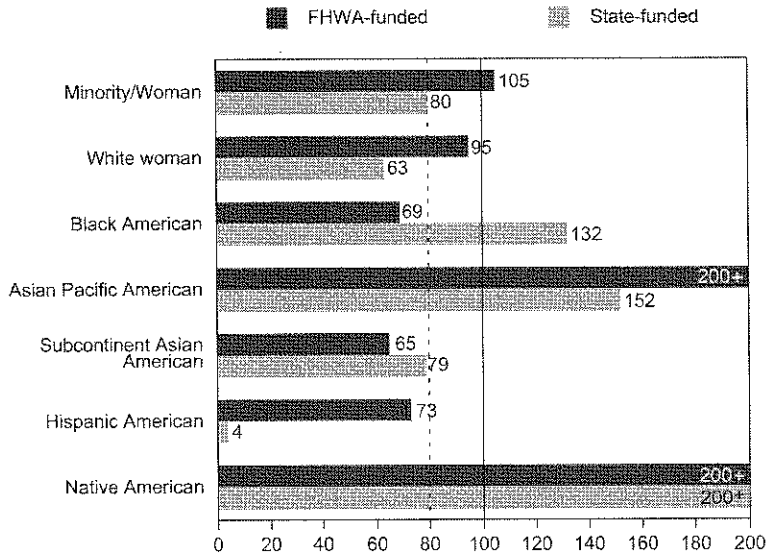
Note:

The study team analyzed 17,090 FHWA-funded contracts and 4,096 state-funded contracts.

For more detail, see Figures F-17 and F-18 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



B. Are there Disparities for Relevant Contracting Areas?

BBC examined disparity analysis results separately for construction; professional services; and goods and support services contracts that INDOT awarded during the study period. That information might help INDOT refine its implementation of the Federal DBE Program and the State of Indiana's MBE/WBE Program for particular contracting areas. Figure 8-2 presents disparity indices for all relevant racial/ethnic and gender groups separately for each contracting area. Overall, minority- and woman-owned businesses did not exhibit substantial disparities for construction contracts (disparity index of 105) or professional services contracts (disparity index of 95). However, minority- and woman-owned businesses did exhibit a substantial disparity for goods and support services contracts (disparity index of 54). There were several key differences in disparities by contract type and group:

- Subcontinent Asian American-owned businesses (disparity index of 21) and Hispanic American-owned businesses (disparity index of 22) exhibited substantial disparities for construction contracts.
- Black American-owned businesses (disparity index of 35) and Subcontinent Asian American-owned businesses (disparity index of 77) exhibited substantial disparities for professional services contracts.
- All groups of minority- and woman-owned businesses exhibited substantial disparities for goods and support services contracts.

INDOT applied DBE or MBE/WBE contract goals to most of the construction and professional services contracts that it awarded during the study period. However, the agency did not enforce

the use of DBE or MBE/WBE contract goals on goods and support services contracts. The disparity analysis results shown in Figure 8-2 are largely reflective of the use of those measures.

Figure 8-2.
Disparity indices for construction; professional services; and goods and support services

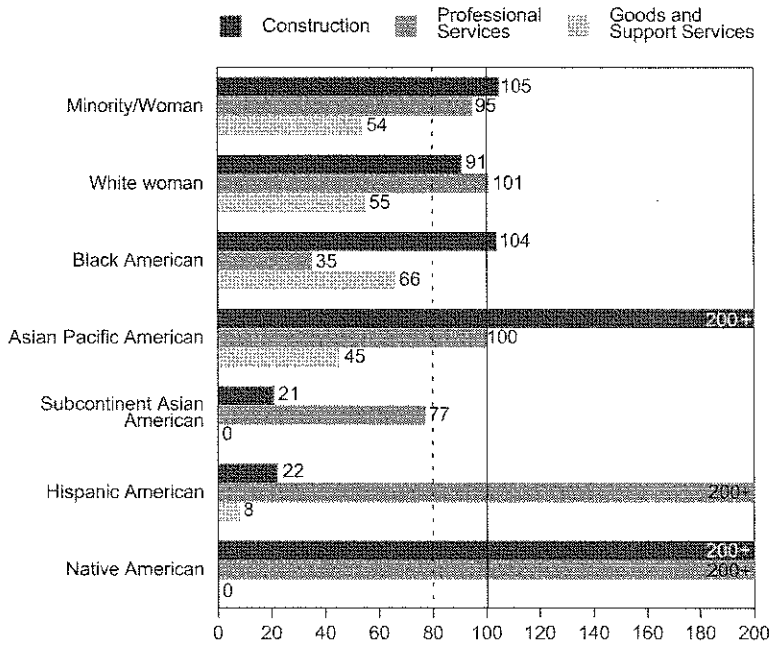
Note:

The study team analyzed 17,079 construction contracts; 3,352 professional services contracts; and 755 goods and support services contracts.

For more detail, see Figures F-3, F-4, and F-5 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



C. Are there Disparities for Prime Contracts and Subcontracts?

BBC examined disparity analysis results separately for prime contracts and subcontracts to assess whether minority- and woman-owned businesses exhibited different outcomes based on their roles as either prime contractors or subcontractors. Figure 8-3 presents disparity indices for all relevant racial/ethnic and gender groups separately for prime contracts and subcontracts.

Figure 8-3.
Disparity indices for prime contracts and subcontracts

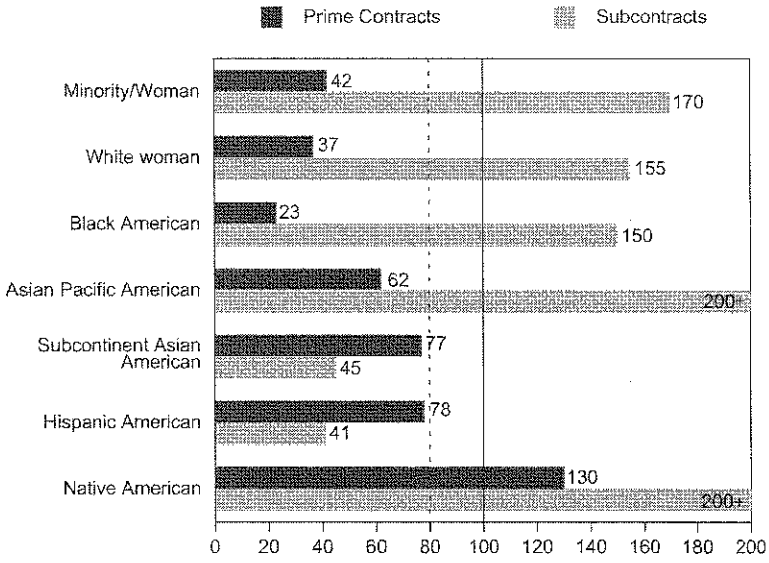
Note:

The study team analyzed 8,263 prime contracts and 12,923 subcontracts.

For more detail, see Figures F-8 and F-9 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



Overall, minority- and woman-owned businesses exhibited substantial disparities for prime contracts (disparity index of 42) but not for subcontracts contracts (disparity index of 170). There were key differences in disparities by contract type and group:

- Black American-owned businesses (disparity index of 23), Asian Pacific American-owned businesses (disparity index of 62), Subcontinent Asian American-owned businesses (disparity index of 77), Hispanic American-owned businesses (disparity index of 78), and white woman-owned businesses (disparity index of 37) exhibited substantial disparities for prime contracts.
- Subcontinent Asian American-owned businesses (disparity index of 45) and Hispanic American-owned businesses (disparity index of 41) exhibited substantial disparities for subcontracts.

Note that INDOT's use of DBE and MBE/WBE contract goals are subcontracting goals programs. Disparity analysis results for subcontracts indicate that the use of those goals is largely effective in encouraging the participation of minority- and woman-owned businesses in INDOT subcontracts.

D. Are there Disparities for Different Time Periods?

BBC examined disparity analysis results separately for two separate time periods—July 1, 2009 through June 30, 2011 (*early* study period) and July 1, 2011 through June 30, 2013 (*late* study period). That information might help INDOT determine whether there were different outcomes for minority- and woman-owned businesses as the country moved further and further from the economic downturn that began in 2008. Figure 8-4 presents disparity indices for all relevant racial/ethnic and gender groups separately for the early and late study periods. Overall, whereas minority- and woman-owned businesses exhibited a disparity for contracts that INDOT awarded in the early study period (disparity index of 86), they did not exhibit a disparity for contracts that the agency awarded in the late study period (disparity index of 123).

Figure 8-4.
Disparity indices for early and late study period

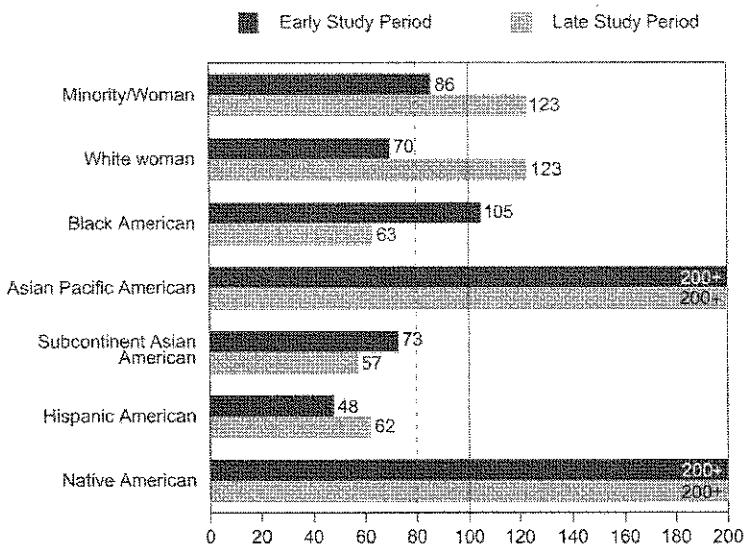
Note:

The study team analyzed 12,684 contracts in the early study period and 8,502 contracts in the late study period.

For more detail, see Figures F-6 and F-7 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



There were key differences in disparities by study period and group:

- Subcontinent Asian American-owned businesses (disparity index of 73), Hispanic American-owned businesses (disparity index of 48), and white woman-owned businesses (disparity index of 70) exhibited substantial disparities for contracts that INDOT awarded in the early study period.
- Black American-owned businesses (disparity index of 63), Subcontinent Asian American-owned businesses (disparity index of 57), and Hispanic American-owned businesses (disparity index of 62) exhibited substantial disparities for contracts that INDOT awarded in the late study period.

E. Are there Disparities for Large and Small Prime Contracts?

BBC compared disparity analysis results for "large" prime contracts and "small" prime contracts that INDOT awarded during the study period to assess whether contract size affected disparity analysis results for prime contracts. "Large" prime contracts were defined as construction contracts worth more than $2 million; professional services contracts worth more than $500,000; or goods and support services contracts worth more than $75,000. "Small" prime contracts were defined as construction contracts worth $2 million or less; professional services contracts worth $500,000 or less; or goods and support services contracts worth $75,000 or less. Figure 8-5 presents disparity indices for all relevant racial/ethnic and gender groups separately for large and small prime contracts.

Figure 8-5.
Disparity indices for large and small prime contracts

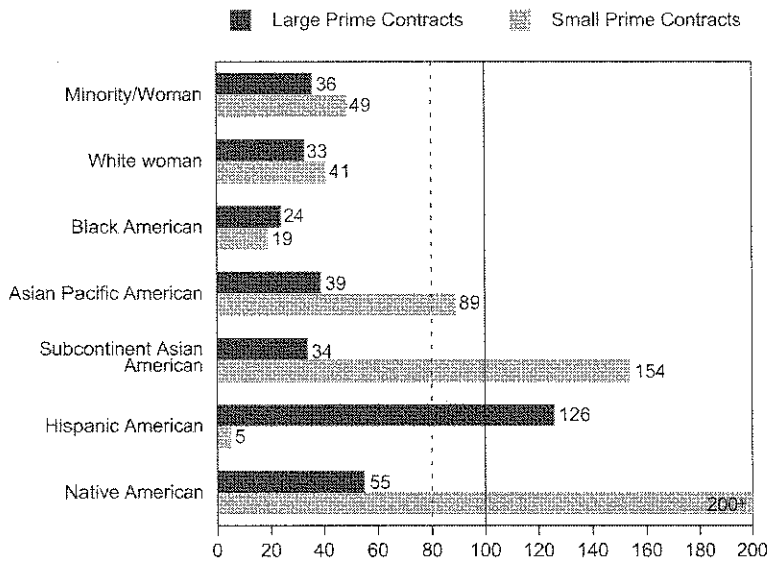
Note:

The study team analyzed 852 large prime contracts and 7,411 small prime contracts.

For more detail, see Figures F-10 and F-11 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



Overall, minority- and woman-owned businesses exhibited substantial disparities for both large prime contracts (disparity index of 36) and small prime contracts (disparity index of 49).

- Black American-owned businesses (disparity index of 24), Asian Pacific American-owned businesses (disparity index of 39), Subcontinent Asian American-owned businesses (disparity index of 34), Native American-owned businesses (disparity index of 55), and

white woman-owned businesses (disparity index of 33) exhibited substantial disparities for large prime contracts.

- Black American-owned businesses (disparity index of 19), Hispanic American-owned businesses (disparity index of 5), and white woman-owned businesses (disparity index of 41) exhibited substantial disparities for small prime contracts.

F. Do Bid/Proposal Processes Explain Any Disparities for Prime Contracts?

BBC completed a case study analysis to assess whether characteristics of INDOT's bid and proposal evaluation processes help to explain any of the disparities that the study team observed for prime contracts. BBC analyzed bid and proposal information from samples of the contracts that INDOT awarded during the study period.

Construction. BBC examined bid information for a sample of 153 construction contracts that INDOT awarded during the study period. In total, INDOT received 707 bids for those contracts.

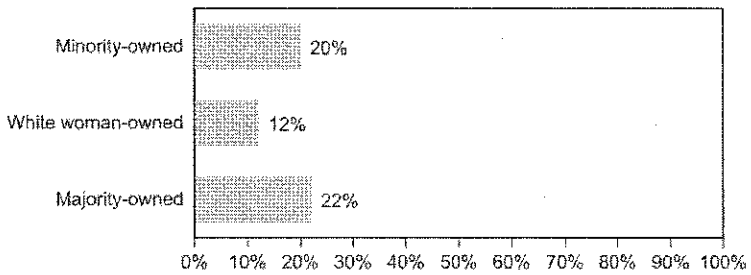
Number of bids from minority- and woman-owned businesses. Minority- and woman-owned businesses submitted 38 of the 707 bids (5%) that the study team examined:

- Five bids (1% of all bids) came from minority-owned businesses (four different businesses); and
- Thirty-three bids (5% of all bids) came from white woman-owned businesses (18 different businesses).

As part of availability surveys, the study team asked construction business owners and managers to indicate whether their companies compete as prime contractors on public contracts. Of the business owners and managers that indicated that their companies compete as prime contractors, 6 percent represented minority-owned businesses and 15 percent represented white woman-owned businesses. Those percentages were higher than the percentage of minority-owned and white woman-owned businesses that submitted bids on INDOT construction contracts during the study period.

Success of bids. BBC also examined the percentage of bids that minority- and woman-owned businesses submitted that resulted in contract awards. As shown in Figure 8-6, 20 percent of the bids that minority-owned businesses submitted resulted in contract awards, which was slightly lower than the percent of bids that majority-owned businesses submitted that resulted in contract awards (22%). Of the bids that white woman-owned businesses submitted, 12 percent resulted in contract awards, lower than the percent of bids that majority-owned businesses submitted that resulted in contract awards.

Figure 8-6.
Percentage of bids on construction contracts that resulted in contract awards



Note:
Based on analysis of 707 bids on 153 contracts.
Source:
BBC Research & Consulting from entity contracting data.

Professional services. BBC examined proposal information for a sample of 39 professional services contracts that INDOT awarded during the study period. In total, INDOT received 442 proposals for those contracts.

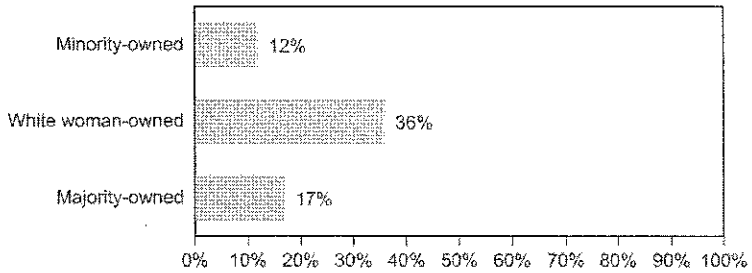
Number of proposals from minority- and woman-owned businesses. Minority- and woman-owned businesses submitted 90 of the 442 proposals (20%) that the study team examined:

- Seventy-six proposals (17% of all proposals) came from minority-owned businesses (20 different businesses); and
- Fourteen proposals (3% of all proposals) came from white woman-owned businesses (six different businesses).

Of the professional services business owners and managers that indicated in availability surveys that their companies are interested in competing as prime contractors on public contracts, 10 percent represented minority-owned businesses and 21 percent represented white woman-owned businesses. Those percentages were lower than the percentage of minority-owned businesses that submitted proposals on INDOT's professional services contracts during the study period but higher than the percentage of white woman-owned businesses that submitted proposals.

Success of bids. BBC also examined the percentage of proposals that minority- and woman-owned businesses submitted that resulted in contract awards. As shown in Figure 8-7, 12 percent of the proposals that minority-owned businesses submitted resulted in contract awards, which was lower than the percent of proposals that majority-owned businesses submitted that resulted in contract awards (17%). Of the proposals that white woman-owned businesses submitted, 36 percent resulted in contract awards, substantially higher than the percent of proposals that majority-owned businesses submitted that resulted in contract awards.

Figure 8-7.
Percentage of bids on professional services contracts that resulted in contract awards



Note:
Based on analysis of 442 bids on 39 contracts.
Source:
BBC Research & Consulting from entity contracting data.

Procurement. BBC examined bid information for a sample of seven goods and support services contracts that INDOT's Procurement Division awarded during the study period. In total, INDOT received 54 bids for those contracts.

Number of bids from minority- and woman-owned businesses. Minority- and woman-owned businesses submitted three of the 54 bids (6%) that the study team examined:

- One bid (2% of all bids) came from minority-owned businesses; and
- Two bids (4% of all bids) came from white woman-owned businesses (one business).

Of the procurement business owners and managers that indicated in availability surveys that their companies are interested in competing as prime contractors on public contracts, 15 percent represented minority-owned businesses and 21 percent represented white woman-owned businesses. Those percentages were higher than the percentage of minority-owned and white woman-owned businesses that actually submitted bids on INDOT's procurement contracts during the study period.

Success of bids. BBC also examined the percentage of bids that minority- and woman-owned businesses submitted that resulted in contract awards. All bids that minority- or woman-owned businesses submitted resulted in a contract award, which was slightly higher than the percent of bids that majority-owned businesses submitted that resulted in contract awards (92%).

CHAPTER 9.
Overall DBE Goal

As part of its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program, the Indiana Department of Transportation (INDOT) is required to set an overall goal for DBE participation in its Federal Highway Administration (FHWA)-funded contracts. The Final Rule effective February 28, 2011 revised requirements for goal-setting so that agencies that implement the Federal DBE Program need to develop overall DBE goals every three years. However, the overall DBE goal is an *annual* goal in that an agency must monitor DBE participation in its FHWA-funded contracts every year. If DBE participation for a particular year is less than the overall DBE goal for that year, then the agency must analyze the reasons for the difference and establish specific measures to enable the agency to meet the goal in the next year.

INDOT must prepare and submit a Goal and Methodology document to FHWA that presents its overall DBE goal that is supported by information about the steps that the agency took to develop the goal. INDOT last developed an overall DBE goal for FHWA-funded contracts for federal fiscal years (FFYs) 2014 through 2016. The agency established an overall DBE goal of 12.4 percent. INDOT indicated to FHWA that it planned to meet the goal through the use of a combination of race- and gender-neutral and race- and gender-conscious program measures.

INDOT is required to develop a new goal for FFYs 2017 through 2019. Chapter 9 provides information that INDOT might consider as part of setting its new overall DBE goal. Chapter 9 is organized in two parts that are based on the two-step process that 49 Code of Federal Regulations (CFR) Part 26.45 outlines for agencies to set their overall DBE goals:

A. Establishing a base figure; and

B. Considering a step-2 adjustment.

A. Establishing a Base Figure

Establishing a base figure is the first step in calculating an overall goal for DBE participation in INDOT's FHWA-funded transportation contracts. As presented in Chapter 5, potential DBEs—that is, minority- and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on their ownership and annual revenue limits described in 13 CFR Part 121 and 49 CFR Part 26—might be expected to receive 10.9 percent of INDOT's FHWA-funded prime contract and subcontract dollars based on their availability for that work. INDOT might consider 10.9 percent as the base figure for its overall DBE goal if it anticipates that the types, sizes, and locations of FHWA-funded contracts that the agency awards in the future will be similar to the FHWA-funded contracts that it awarded during the study period (July 1, 2009 through June 30, 2013).

Figure 9-1 presents the construction; professional services; and goods and support services components of the base figure for INDOT's overall DBE goal. The availability estimates presented in Figure 9-1 are based on the availability of potential DBEs for FHWA-funded prime contracts

and subcontracts. The overall base figure reflects a weight of 0.87 for construction contracts; 0.12 for professional services contracts; and 0.01 for goods and support services contracts based on the volume of dollars of FHWA-funded contracts that INDOT awarded during the study period. If INDOT expects that the relative distributions of FHWA-funded construction; professional services; and goods and support services contract dollars will change substantially in the future, the agency might consider applying different weights to the corresponding base figure components. INDOT might also consider evaluating whether the types, sizes, and locations of the FHWA-funded contracts that it awards will change substantially in the future.

Figure 9-1.
Availability components of the base figure
(based on availability of potential DBEs for FHWA-funded transportation contracts)

	Availability Percentage			
Potential DBEs	Construction	Professional Services	Goods and Support Services	Total
Black American-owned	1.3 %	0.9 %	1.6 %	1.2 %
Asian Pacific American-owned	0.1	1.7	0.0	0.3
Subcontinent Asian American-owned	0.1	4.2	0.1	0.6
Hispanic American-owned	0.6	0.0	0.1	0.5
Native American-owned	0.2	0.0	0.0	0.2
White woman-owned	8.5	4.1	19.0	8.0
Total potential DBEs	**10.8 %**	**11.0 %**	**20.7 %**	**10.9 %**
Industry weight	**87 %**	**12 %**	**1 %**	

Note: Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
See Figures F-19, F-20, F-21, and F-22 in Appendix F for corresponding disparity results tables.

Source: BBC Research & Consulting availability analysis.

B. Considering a Step-2 Adjustment

The Federal DBE Program requires INDOT to consider a potential step-2 adjustment to its base figure as part of determining its overall DBE goal. INDOT is not required to make a step-2 adjustment as long as it considers appropriate factors and explains its decision in its Goal and Methodology document. The Federal DBE Program outlines several factors that an agency must consider when assessing whether to make a step-2 adjustment to its base figure:

1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years;
2. Information related to employment, self-employment, education, training, and unions;
3. Any disparities in the ability of DBEs to get financing, bonding, and insurance; and
4. Other relevant data.[1]

[1] 49 CFR Section 26.45.

BBC Research & Consulting (BBC) completed an analysis of each of the above step-2 factors. Much of the information that BBC examined was not easily quantifiable but is still relevant to INDOT as it determines whether to make a step-2 adjustment.

1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years. The United States Department of Transportation's (USDOT's) "Tips for Goal-Setting" suggests that agencies should examine data on past DBE participation in their USDOT-funded contracts in recent years. USDOT further suggests that agencies should choose the median level of annual DBE participation for those years as the measure of past participation:

> *Your goal setting process will be more accurate if you use the median (instead of the average or mean) of your past participation to make your adjustment because the process of determining the median excludes all outlier (abnormally high or abnormally low) past participation percentages.*[2]

Figure 9-2 presents past DBE participation based on INDOT's Uniform Reports of DBE Awards or Commitments and Payments as reported to FHWA. According to INDOT's Uniform Reports, median DBE participation in FHWA-funded contracts from FFYs 2010 through 2015 was 8.9 percent.

Figure 9-2.
Past certified DBE participation in FHWA-funded contracts, FFY 2010-2015

Source:
Commitments/Awards reported on INDOT's Uniform Reports of DBE Awards/Commitments and Payments.

FFY	DBE Attainment	Annual DBE Goal	Difference
2010	6.48 %	9.70 %	-3.22 %
2011	5.83	10.17	-4.34
2012	8.26	10.17	-1.91
2013	9.50	12.40	-2.90
2014	10.12	12.40	-2.28
2015	9.59	12.40	-2.81

The information about past DBE participation supports a downward adjustment to INDOT's base figure. If INDOT were to use the approach that USDOT outlined in "Tips for Goals Setting" based on Uniform Reports of DBE Awards/Commitments and Payments, the overall goal would be the average of the 10.9 percent base figure and the 8.9 percent median past DBE participation, yielding a potential overall DBE goal of 9.9 percent. BBC's analysis of DBE participation in INDOT's FHWA-funded contracts indicates DBE participation (6.4%) that is also lower than the base figure. If INDOT were to adjust its base figure based on DBE participation information from the disparity study, it might consider taking the average of the 10.9 percent base figure and the 6.4 percent DBE participation, yielding a potential overall DBE goal of 8.7 percent.

2. Information related to employment, self-employment, education, training, and unions. Chapter 3 summarizes information about conditions in the local contracting industry for minorities, women, and minority- and woman-owned businesses. Additional information

[2] Section III-(A)(5)(c) in USDOT's "Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program." http://www.osdbu.dot.gov/DBEProgram/tips.cfm

about quantitative and qualitative analyses of conditions in the local marketplace are presented in Appendices D and E. BBC's analyses indicate that there are barriers that certain minority groups and women face related to human capital, financial capital, and business ownership in the Indiana contracting industry. Such barriers may decrease the availability of minority- and woman-owned businesses to obtain and perform the FHWA-funded contracts that INDOT awards, which supports an upward step-2 adjustment to INDOT's base figure.

3. Any disparities in the ability of DBEs to get financing, bonding, and insurance. BBC's analysis of access to financing, bonding, and insurance also revealed quantitative and qualitative evidence that minorities, women, and minority- and woman-owned businesses in Indiana do not have the same access to those business inputs as non-Hispanic white men and businesses owned by non-Hispanic white men (for details, see Chapter 3 and Appendices D and E). Any barriers to obtaining financing, bonding, and insurance might limit opportunities for minorities and women to successfully form and operate businesses in the Indiana contracting marketplace. Any barriers that minority- and woman-owned businesses face in obtaining financing, bonding, and insurance would also place those businesses at a disadvantage in competing for INDOT's FHWA-funded prime contracts and subcontracts. Thus, information from the disparity study about financing, bonding, and insurance also supports an upward step-2 adjustment to INDOT's base figure.

4. Other factors. The Federal DBE Program suggests that federal fund recipients also examine "other factors" when determining whether to make step-2 adjustments to their base figures.[3]

Success of businesses. There is quantitative evidence that certain groups of minority- and woman-owned businesses are less successful than businesses owned by non-Hispanic white men and face greater barriers in the marketplace, even after accounting for race- and gender-neutral factors. Chapter 3 summarizes that evidence and Appendix D presents corresponding quantitative analyses. There is also qualitative evidence of barriers to the success of minority- and woman-owned businesses, as presented in Appendix E. Some of that information suggests that discrimination on the basis of race/ethnicity and gender adversely affects minority- and woman-owned businesses in the local contracting industry. Thus, information about the success of businesses also supports an upward step-2 adjustment to INDOT's base figure.

Evidence from disparity studies conducted within the jurisdiction. USDOT suggests that federal aid recipients also examine evidence from disparity studies conducted within their jurisdictions when determining whether to make step-2 adjustments to their base figures. BBC also conducted disparity studies for 10 other Indiana state agencies and entities. INDOT should review results from those disparity studies when determining its overall DBE goal. However, INDOT should note that the results of those studies are tailored specifically to the contracts and policies of each agency and entity. Those contracts and policies may differ in many important respects from those of INDOT.

Percent of DBE-certified firms in INDOT's bidders list. USDOT indicates that an agency may use data from its bidders list to inform goal-setting given that those data are disaggregated and

[3] 49 CFR Section 26.45.

weighted appropriately. INDOT conducted an analysis of its bidders list examining the percentage of firms that are DBE-certified. INDOT conducted the analysis by disaggregating the businesses by contracting area, finding the percentage of businesses that are DBE-certified in each category, and applying weights to each category according to the number of contracts that INDOT awarded. INDOT's analysis indicated that 3.7 percent of its bidders list is made up of DBE-certified businesses. Thus, data from INDOT's bidders list support a downward step-2 adjustment to INDOT's base figure.

Summary. Taken together, the quantitative and qualitative evidence that the study team collected as part of the disparity study may support a step-2 adjustment to the base figure as INDOT considers setting its overall DBE goal. As noted in USDOT's "Tips for Goal-Setting:"

> *If the evidence suggests that an adjustment is warranted, it is critically important to ensure that there is a rational relationship between the data you are using to make the adjustment and the actual numerical adjustment made.*[4]

Based on information from the disparity study, there are reasons why INDOT might consider an upward adjustment to its base figure:

- INDOT might adjust its base figure upward to account for barriers that minorities and women face in human capital and owning businesses in the local contracting industry. Such an adjustment would correspond to a "determination of the level of DBE participation you would expect absent the effects of discrimination."[5]
- Evidence of barriers that affect minorities, women, and minority- and woman-owned businesses in obtaining financing, bonding, and insurance, and evidence that certain groups of minority- and woman-owned businesses are less successful than comparable businesses owned by non-Hispanic white men also supports an upward adjustment to INDOT's base figure.

There are also reasons why INDOT might consider a downward adjustment to its base figure:

- INDOT must consider the volume of work DBEs have performed in recent years when determining whether to make a step-2 adjustment to its base figure. INDOT's utilization reports for FFYs 2010 through 2015 indicated median annual DBE participation of 8.9 percent for those years, which is lower than its base figure. USDOT's "Tips for Goal-Setting" suggests that an agency can make a step-2 adjustment by averaging the base figure with past median DBE participation. BBC's analysis of DBE participation in INDOT's FHWA-funded contracts also indicates DBE participation (6.4%) that is lower than the base figure. If INDOT were to adjust its base figure based on DBE participation information from the disparity study, it might consider taking the average of its base figure and the 6.4 percent DBE participation.

---

[4] USDOT. "Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program." http://www.osdbu.dot.gov/DBEProgram/tips.cfm.

[5] 49 CFR Section 26.45 (b).

- INDOT might adjust its base figure downward to account for the availability of DBE-certified firms (3.7%) on its bidders list. If INDOT were to adjust its base figure based on the disaggregated, weighted analysis of its bidders list, it should acknowledge the absence of potential DBEs from that analysis.

USDOT regulations clearly state that an agency such as INDOT is required to review a broad range of information when considering whether it is necessary to make a step-2 adjustment—either upward or downward—to its base figure. However, *Tips for Goal-Setting* states that an agency such as INDOT is not required to make an adjustment as long as it can explain what factors it considered and can explain its decision in its Goal and Methodology document.

CHAPTER 10.
Program Measures

The Indiana Department of Transportation (INDOT) uses a combination of *race- and gender-neutral measures* and *race- and gender-conscious measures* to encourage the participation of minority- and woman-owned businesses in its contracting. INDOT uses those measures as part of its compliance with the State of Indiana's Minority and Women's Business Enterprises (MBE/WBE) Program and the Federal Disadvantaged Business Enterprise (DBE) Program. Race- and gender-neutral measures are measures that are designed to encourage the participation of all businesses—or, all small businesses—in an entity's contracting. Participation in such measures is not limited to minority- and woman-owned businesses or to certified MBEs, WBEs, or DBEs. In contrast, race- and gender-conscious measures are measures that are designed to specifically encourage the participation of minority- and woman-owned businesses in an entity's contracting (e.g., using DBE or MBE/WBE goals on individual contracts).

As part of meeting the *narrow tailoring* requirement of the strict scrutiny standard of constitutional review, agencies that comply with or implement minority- and woman-owned business programs—including the State of Indiana's MBE/WBE Program and the Federal DBE Program—must meet the maximum feasible portion of overall annual minority- and woman-owned business participation goals through the use of race- and gender-neutral measures (for details, see Chapter 2 and Appendix B).[1] If an agency cannot meet its overall minority- or woman-owned business participation goals through the use of race- and gender-neutral measures alone, then it can consider using race- and gender-conscious measures.

As part of the Federal DBE Program, an agency must determine whether it can meet its overall DBE goal solely through race- and gender-neutral measures or whether race- and gender-conscious measures—such as DBE contract goals—are also needed. As part of doing so, an agency must project the portion of its overall DBE goal that it expects to meet through race- and gender-neutral measures and what portion it expects to meet through race- and gender-conscious measures. The United States Department of Transportation (USDOT) offers guidance concerning how a transportation agency should project the portion of its overall DBE goal that it will meet through race- and gender-neutral and race- and gender-conscious measures including the following:

- "USDOT Questions and Answers about 49 CFR Part 26," which addresses factors for federal aid recipients to consider when projecting the portions of their overall DBE goals that they will meet through the use of race- and gender-neutral measures;[2]

---

[1] 49 CFR Section 26.51.

[2] http://www.dotcr.ost.dot.gov/Documents/Dbe/49CFRPART26.doc

- USDOT's "Tips for Goal-Setting," which suggests factors for federal aid recipients to consider when making such projections;[3] and
- Federal Highway Administration (FHWA) template, which describes how the agency considers approving DBE goal and methodology submissions includes a section on projecting the percentage of overall DBE goals to be met through race- and gender neutral and race- and gender-conscious measures. Figure 10-1 presents an excerpt from that template.

Figure 10-1.
Excerpt from Explanation of Approval of [State] DBE Goal Setting Process for FY [Year]

You must also explain the basis for the State's race-neutral/race-conscious division and why it is the State's best estimate of the maximum amount of participation that can be achieved through race-neutral means. There are a variety of types of information that can be relied upon when determining a recipient's race-neutral/race-conscious division. Appropriate information should give a sound analysis of the recipient's market, the race-neutral measures it employs and information on contracting in the recipient's contracting area. Information that could be relied on includes: the extent of participation of DBEs in the recipient's contracts that do not have contract goals; past prime contractors' achievements; excess DBE achievements over past goals; how many DBE primes have participated in the state's programs in the past; or information about state, local or private contracting in similar areas that do not use contracting goals and how many minority and women's businesses participate in programs without goals.

Based on 49 Code of Federal Regulations (CFR) Part 26 and the resources above, general areas of questions that transportation agencies might ask related to making any projections include:

A. Is there evidence of discrimination within the local transportation contracting marketplace for any racial/ethnic or gender groups?

B. What has been the agency's past experience in meeting its overall DBE goal?

C. What has DBE participation been when the agency did not use race- or gender-conscious measures?[4]

D. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?

Chapter 10 is organized around each of those general areas of questions.

A. Is there evidence of discrimination within the local transportation contracting marketplace for any racial/ethnic or gender groups?

As presented in Chapter 3 as well as in Appendices D and E, BBC Research & Consulting (BBC) examined conditions in the Indiana marketplace related to human capital, financial capital, business ownership, and the success of businesses. There is substantial quantitative evidence of disparities for minority- and woman-owned businesses overall and for specific groups concerning the above issues. Qualitative information also indicated evidence of discrimination affecting the local marketplace. However, some minority and woman business owners that the

[3] http://www.osdbu.dot.gov/DBEProgram/tips.cfm

[4] To assess that question, USDOT guidance suggests evaluating (a) DBE participation as prime contractors if DBE contract goals did not affect utilization; (b) DBE participation as prime contractors and subcontractors for agency contracts without DBE goals; and (c) overall utilization for other state/ local or private sector contracting where contract goals were not used.

study team interviewed as part of the disparity study did not think that their businesses had been affected by any race- or gender-based discrimination. INDOT should review the information about marketplace conditions presented in this report as well as other information it may have when considering the extent to which it can meet its overall DBE goal through race- and gender-neutral measures.

B. What has been the agency's past experience in meeting its overall DBE goal?

Figure 10-2 presents the participation of certified DBEs in INDOT's federally-funded transportation contracts in recent years, as presented in INDOT reports to USDOT. Based on information about awards and commitments to DBE-certified businesses, INDOT has not met its overall DBE goal in recent years. In federal fiscal years (FFYs) 2010 through 2015, DBE awards and commitments on FHWA-funded contracts was below INDOT's overall DBE goal by an average of 2.9 percentage points. INDOT applied race- and gender-conscious DBE contract goals to many FHWA-funded transportation contracts during those years.

Figure 10-2.
Past certified DBE participation on FHWA-funded contracts, FFY 2010-2015

Source:
Commitments/Awards reported on INDOT's Uniform Reports of DBE Awards/Commitments and Payments.

FFY	DBE Attainment	Annual DBE Goal	Difference
2010	6.48 %	9.70 %	-3.22 %
2011	5.83	10.17	-4.34
2012	8.26	10.17	-1.91
2013	9.50	12.40	-2.90
2014	10.12	12.40	-2.28
2015	9.59	12.40	-2.81

C. What has DBE participation been when the agency did not use race- or gender-conscious measures?

INDOT applied race- and gender-conscious DBE contract goals to many FHWA-funded transportation contracts and MBE/WBE goals to many state-funded contracts during the study period (July 1, 2009 through June 30, 2013). However, during the study period, the agency did not use race- or gender-conscious program measures on FHWA-funded construction contracts worth less than $300,000 or on FHWA-funded professional services contracts worth less than $80,000. Figure 10-3 presents the participation of certified DBEs in those contracts. DBE participation in those contracts was 2.5 percent.

D. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?

When determining the extent to which INDOT could meet its overall DBE goal through the use of race- and gender- neutral measures, the agency should review the neutral measures that it and other local organizations already have in place. INDOT should also review measures that it has planned, or could consider, for future implementation. BBC reviewed race- and gender-neutral measures that INDOT currently uses to encourage the participation of minority- and woman-owned businesses in its contracting. In addition, BBC reviewed race- and gender-neutral measures that other entities in Indiana use.

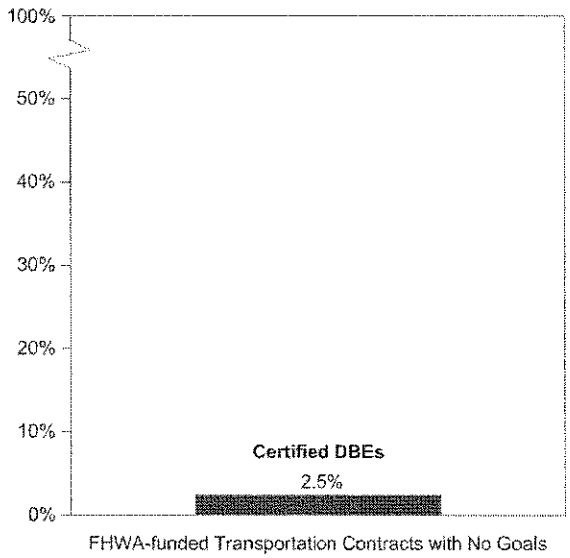
Figure 10-3.
Certified DBE participation in FHWA-funded transportation contracts that did not include race- or gender-conscious measures

Note:

The study team analyzed 4,253 prime contracts and subcontracts.

Source:

BBC Research & Consulting from INDOT contracting data.



INDOT's race- and gender-neutral measures. INDOT uses myriad race- and gender-neutral measures to encourage the participation of small businesses—including many minority- and woman-owned businesses—in its contracting. INDOT uses the following types of race- and gender-neutral measures as part of its efforts to comply with the State of Indiana's MBE/WBE Program and as part of its implementation of the Federal DBE Program:

- Advocacy and outreach efforts;
- Technical assistance programs;
- Capital, bonding, and insurance assistance; and
- Prompt payment policies.

Advocacy and outreach efforts. INDOT participates in various advocacy and outreach efforts including hosting DBE workshops and using communications that are targeted specifically to disadvantaged businesses.

Communications. INDOT communicates with DBEs through email, its website, and its DBE newsletter. INDOT uses its website and its newsletter to announce contracting opportunities, special events, and new DBE program measures. INDOT also contracts with an independent consultant who conducts additional outreach and targets communications to DBEs through mailings, phone calls, and emails.

Identification of potential DBEs. INDOT makes efforts to identify minority- and woman-owned businesses that are not currently DBE-certified but that could become certified based on certification requirements. Minority- and woman-owned businesses that are not certified are encouraged to complete the DBE certification process through INDOT.

Technical assistance programs. INDOT hosts two, multi-day events geared toward providing DBEs and other businesses with assistance in the areas of networking, technology, business development, and other topics.

SINDI. INDOT developed the Statewide Indiana DBE Initiative (SINDI) to encourage minority- and woman-owned businesses in the highway construction industry to consider pursuing work with INDOT. The program includes multiple events that take place throughout the year. The events range from one-day roundtable discussions to three-day workshops. The events cover myriad technical assistance topics including risk management, INDOT supply chain, prequalification processes, technology training, and business development.

EDI. INDOT sponsors an annual multi-day event for DBEs called the Entrepreneurial Development Institute (EDI). It includes a series of workshops related to different business topics such as marketing and advertising; networking; and doing business with INDOT. The workshops are led by INDOT staff, local community partners, and professional outreach consultants.

Prompt payment policies. INDOT has policies in place to help ensure prompt payment to both prime contractors and subcontractors. Prime contractors are paid 35 days after approved estimates are received by the State Auditor from INDOT. Prime contractors are then required to pay their subcontractors within 10 days after receipt of payment from the State Auditor.

Other entities' program measures. In addition to the race- and gender-neutral measures that INDOT currently uses, there are a number of race- and gender-neutral program measures that other entities in Indiana use to encourage the participation of minority- and woman-owned businesses. Figure 9-1 provides examples of those measures."

Figure 10-4.
Examples of race- and gender-neutral programs that other entities in Indiana use

Type	Examples in the Local Marketplace
Advocacy and Outreach	The Indiana Black Expo's annual business conference provides minority businesses with opportunities to build capacity in order to compete for contract opportunities with local, state, federal, private, and post-secondary organizations. Attendees have the opportunity to hear directly from experts on sustaining and expanding their businesses and networking with key decision makers at the Mayor's Breakfast, Governor's Reception, and the state's largest corporate luncheon. The primary mission of the Mid-States Minority Supplier Diversity Council (Mid-State MSDC) is to promote and cultivate successful minority enterprises within the central Illinois, Indiana, and Eastern Missouri business communities. The Mid-States MSDC serves as an advocate for the economic well being and growth of certified MBEs, while also providing a direct connection for corporations who are committed to purchasing products and services from certified MBEs. The Indiana Latino Expo (ILE) is a nonprofit organization which represents a platform of opportunities for the Latino community. It is designed to create awareness and promote the economic development of Hispanic American-owned businesses; drive cultural advancement and educational opportunities; and provide support in health and wellness. A number of Indiana agencies serve as advocates for small businesses working to sponsor focus group sessions, roundtable discussions, seminars, and networking events to highlight small businesses and encourage their participation in government and private sector work. Some local organizations facilitating the outreach and networking include the City of Gary, Indianapolis Public Schools, Mid-State MSDC, Hunt Construction, the Minority Chambers of Commerce, and other community trade associations in the state.

Figure 10-4. (continued)
Examples of race- and gender-neutral programs that other entities in Indiana use

Type	Examples in the Local Marketplace
Capital, Bonding, and Insurance	Small business financing is available through several local agencies within Indiana. For example, the Flagship Enterprise Center, an SBA Microloan Intermediary that supports small business growth by offering loans ranging from $5,000 to $35,000. The Business Ownership Initiative (BOI) of the Indianapolis Microloan Fund also offers loans to microenterprises whose owners cannot obtain regular commercial credit due to their size or lack of a proven track record. Those loans range in size from $1,000 to $50,000. The City of Kokomo's Reach Higher Initiative works to help small businesses through the current economic conditions by offering finance assistance programs including zero-interest working capital loans, forgivable marketing loans, funds for green energy, and downtown facade work. The City of Kokomo also operates the One Step Up Grant Program that provides grants of up to $5,000 to businesses or organizations which seek to raise the educational level and workforce readiness of the Kokomo community. Other agencies in Indiana provide training on how to obtain financing including the Minority Business Enterprise Center, the City of Gary, the City of Indianapolis, the Small Business Development Center, and Partners in Contracting Corporation. The United States Department of Transportation Bonding Education Program (BEP) partners with the Surety and Fidelity Association of America (SFAA) to help small businesses become bond-ready. The BEP is designed to address what businesses need to do to become bond-ready and includes one-on-one sessions with local surety bonding professionals to help in assembling the materials necessary for a complete bond application. The program is tailored to businesses competing for transportation-related contracts. The Surety Association of Indiana is a nonprofit business league comprising professionals that specialize in providing surety credit to construction contractors. The organization's members include insurance agents, underwriters, insurance companies, accountants, law firms, and banks that are specialists in surety bonding. The Small Business Association guarantees bid, performance, and payment bonds issued by surety companies. That guarantee encourages surety companies to bond small businesses who are having difficulty obtaining bonding on their own.
Mentor-Protégé Programs	The Southwest Indiana Chamber's Propel Mentor/Protégé Program matches relatively large businesses with smaller businesses to help build capacity, improve financial literacy, and improve general business acumen. The program consists of a seven-week boot camp that includes weekly three-hour classes, monthly Mentor/Protégé meetings, and monthly peer-to-peer meetings. The Indy Chamber's Hispanic Business Council's (HBC's) mentor-protégé Program is designed to develop Hispanic American-owned businesses by motivating and encouraging other businesses to assist them with business development; establish long-term relationships with large corporations; and compete more successfully in the marketplace. The Indiana Construction Roundtable (ICR) launched its mentor-protégé program to increase the number of minority- and woman-owned businesses in the construction industry and to help increase their capacities. Other organizations, including the American Council of Engineering Companies and the National Association of Women Business Owners, have modeled their mentor-protégé programs after ICR's program. The SBA 8(a) Business Development Mentor-Protégé Program pairs subcontractors with prime contractors to assist small businesses with management, financial, and technical issues. The program also helps small businesses explore joint ventures and subcontracting opportunities for federally-funded contracts. Eli Lilly & Company offers a mentor-protégé program to help develop minority- and woman-owned businesses in the private sector. The program supports emerging businesses to increase their capacities and competitiveness by providing business mentoring, partnering, and technical assistance and by marketing those businesses to internal clients and partners. Gaylor, Inc. participates in the Mentor-Protégé Agreement to assist small businesses to successfully compete for prime contracts and subcontracts. As the mentor, Gaylor provides advice and assistance in the areas of finance, bonding, bidding, technical assistance, training, and relationship building.

Figure 10-4. (continued)
Examples of race- and gender-neutral programs that other entities in Indiana use

Type	Examples in the Local Marketplace
Technical Assistance	The Minority Business Development Agency (MBDA), an agency of the United States Department of Commerce, has a program in place to help promote the growth and global competitiveness of small, medium, and large businesses that are owned and operated by members of minority communities. Through its network of more than 40 business centers and its wide range of strategic partners, MBDA provides minority- and women-owned businesses with technical assistance and access to capital, contract opportunities, and new markets. The Indianapolis Service Corps of Retired Executives (SCORE) serves as a source of free small business advice for entrepreneurs. SCORE is a volunteer, non-profit organization whose mission is to promote the success of small businesses in central Indiana. SCORE mentors provide free and confidential business assistance to both prospective entrepreneurs and existing small business owners. The organization also conducts a variety of workshops that address many of the essential techniques necessary for establishing and managing a successful business. The Office of Small Business and Entrepreneurship (OSBE) provides access to business consultants in a variety of specialized fields including business plan development, capital formation, exporting, government procurement, and strategic planning. Those consulting services are available at no cost to business owners. The Indy Chamber's Business Ownership Initiative (BOI) offers a range of workshops to meet businesses' needs in any stage of business development. Workshop topics include business planning, business necessities, creating a business plan, recordkeeping, financial management, marketing, and sales. The Small Business Administration (SBA) operates the 7(j) Management and Technical Assistance Program to provide specialized assistance to underserved markets. The assistance focuses on helping businesses succeed in federal, state, and local government markets for goods and services, and as subcontractors to prime contractors working in government contracting. The assistance addresses myriad topics including marketing; strategic and operational planning; financial analysis; opportunity development and capture; contract management; and compliance.

CHAPTER 11.
Program Implementation

Chapter 11 reviews information relevant to the Indiana Department of Transportation's (INDOT's) implementation of specific components of the Federal Disadvantaged Business Enterprise (DBE) Program for Federal Highway Administration (FHWA)-funded contracts. In addition, Chapter 11 presents considerations that the agency should make as it works to refine its compliance with the State of Indiana's Minority and Women's Business Enterprises (MBE/WBE) Program.

A. Federal DBE Program

Regulations presented in 49 Code of Federal regulations (CFR) Part 26 and associated documents offer agencies guidance related to implementing the Federal DBE Program. Key requirements of the program are described below in the order that they are presented in 49 CFR Part 26.[1]

Reporting to DOT – 49 CFR Part 26.11 (b). INDOT must periodically report DBE participation in its FHWA-funded contracts to the United States Department of Transportation (USDOT). INDOT tracks DBE and non-DBE participation through its Subcontractor Payment Tracking system. Prime contractors and DBE subcontractors must sign for each progress payment indicating that they have paid all subcontractors, and INDOT tracks the total amount of those payments to calculate DBE participation. Based on that information, INDOT prepares Uniform Reports of DBE Awards or Commitments and Payments, which it reports to USDOT. INDOT plans to continue to collect and report that information in the future using the same approach.

Bidders list – 49 CFR Part 26.11 (c). As part of its implementation of the Federal DBE Program, INDOT must develop a bidders list of businesses that are available for its contracts. The bidders list must include the following information about each available business:

- Firm name;
- Address;
- DBE status;
- Age of firm; and
- Annual gross receipts.

INDOT currently maintains a bidders list that includes all of the above information for businesses bidding or proposing on the agency's FHWA-funded prime contracts and subcontracts.

[1] Because only certain portions of the Federal DBE Program are discussed in Chapter 11, INDOT should refer to the complete federal regulations when considering its implementation of the program.

Information from availability surveys. As part of the availability analysis, the study team collected information about local businesses that are potentially available for different types of INDOT prime contracts and subcontracts. INDOT should consider using that information to augment its current bidders list.

Maintaining comprehensive vendor data. In order to effectively track the participation of minority- and woman-owned businesses on its contracts, INDOT should consider continuing to improve the information that it collects on the ownership status of businesses that participate in its contracts, including both prime contractors and subcontractors. Not only should INDOT consider collecting information about DBE status, but it should also consider obtaining information on the race/ethnicity and gender of business owners regardless of certification status. As appropriate, INDOT can use business information that the study team collected as part of the 2015-16 disparity study to augment its vendor data.

Prompt payment mechanisms – 49 CFR Part 26.29. INDOT's prompt payment policies appear to comply with the federal regulations in 49 CFR Part 26.29. Prime contractors are paid within 35 days after approved estimates are received by the State Auditor from INDOT. Prime contractors are then required to pay their subcontractors no later than 10 days after receiving payment from the State Auditor. Qualitative information that the study team collected through in-depth interviews and public meetings revealed that some businesses are dissatisfied with how promptly they receive payment on Indiana government contracts. INDOT should consider maintaining the efforts it makes to ensure prompt payment to both prime contractors and subcontractors.

DBE directory – 49 CFR Part 26.31. INDOT offers a directory on its website of all DBE-certified businesses, searchable by business name, industry code, industry type, and geographical location. Qualitative information that the study team collected through in-depth interviews and public meetings indicated that many business owners and managers are aware of the directory but others may not be. INDOT might consider working to increase awareness of the DBE directory so that prime contractors are better aware of qualified DBE subcontractors. In addition, INDOT currently publicizes bid and solicitation information on its website. INDOT should consider linking that information to information about qualified DBEs, so that when prime contractors become aware of contracts in which they might be interested, they are also notified of qualified DBEs who might be interested in participating in those contracts as subcontractors.

Overconcentration – 49 CFR Part 26.33. Agencies implementing the Federal DBE Program are required to report and take corrective measures if they find that DBEs are so overconcentrated in certain work areas as to unduly burden non-DBEs working in those areas. Such measures may include:

- Developing ways to assist DBEs to move into nontraditional areas of work;
- Varying the use of DBE contract goals; and
- Working with contractors to find and use DBEs in other industry areas.

INDOT's policy states that if overconcentration occurs, the agency will obtain approval from USDOT to develop appropriate measures to address it. Once approved, the measures will then become part of INDOT's implementation of the Federal DBE program.

BBC investigated potential overconcentration in INDOT contracts. There were nine specific subindustries in which certified DBEs accounted for 50 percent or more of total subcontract dollars for contracts awarded between July 1, 2009 and June 30, 2013 based on contract data that the study team received from INDOT:

- Office supplies (100%);
- Printing and copying (98%);
- Fencing, guardrails, and signs (95%);
- Construction management (92%);
- Structural metals (87%);
- Industrial chemicals (75%);
- Finance and accounting (73%);
- Trucking, hauling, and storage (70%); and
- Structural steel and building construction (57%).

Because the above figures are based only on subcontract dollars, they do not include work that prime contractors self-performed in those areas. If the study team had included self-performed work in those analyses, the percentages for which DBEs accounted would likely have decreased. In addition, the above figures are based on both FHWA- and state-funded contracts and would likely differ if limited to only FHWA-funded contracts. INDOT should consider reviewing similar information and continuing to monitor the above types of work for potential overconcentration in the future.

Business development programs – 49 CFR Part 26.35 and mentor-protégé programs – 49 CFR Appendix D to Part 26. Business Development Programs (BDPs) are programs that are designed to assist DBE-certified businesses in developing the capabilities to compete for work independent of the DBE Program. INDOT offers a number of BDPs for potential and current DBEs including:

- Supportive Services programs, which offer business development opportunities for certified DBEs;
- The Entrepreneurial Development Institute (EDI), which provides managerial, technical, financial management, and technological classroom training for DBE-certified construction and construction-related professional services businesses; and
- The Statewide Indiana Initiative (SINDI), which educates potential DBEs about the benefits of DBE certification.

INDOT should continue to communicate with certified DBEs to ensure that its BDPs provide the most relevant specialized assistance that is tailored to the needs of developing businesses in the

Indiana marketplace. INDOT might explore additional partnerships to implement other BDPs including implementing a mentor-protégé program. Such programs could provide specialized assistance that would be tailored to the needs of developing businesses.

Responsibilities for monitoring the performance of program participants – 49 CFR Part 26.37 and 49 CFR Part 26.55. The Final Rule effective February 28, 2011, revised requirements for monitoring the work that prime contractors commit to DBE subcontractors at contract award (or through contract modifications) and enforcing that those DBEs actually perform that work. USDOT describes the requirements in 49 CFR Part 26.37(b). The Final Rule states that prime contractors can only terminate DBEs for "good cause" and with written consent from the awarding agency. In addition, 49 CFR Part 26.55 requires agencies to only count the participation of DBEs that are performing commercially useful functions (CUFs) on contracts toward meeting DBE contract goals and overall DBE goals. INDOT implements a number of monitoring and enforcement mechanisms, including:

- A review of DBE participation both prior to and after contract award;
- DBE subcontract payment tracking through its subcontract payment tracking system; and
- CUF reviews, which require INDOT's Equal Employment Opportunity Officers to monitor DBE performance for compliance with CUF requirements.

INDOT should consider reviewing the requirements set forth in 49 CFR Part 26.37(b), 49 CFR Part 26.55, and in The Final Rule to ensure that its monitoring and enforcement mechanisms are appropriately implemented and consistent with federal regulations and best practices.

Fostering small business participation – 49 CFR Part 26.39. When implementing the Federal DBE Program, INDOT must include measures to structure contracting requirements to facilitate competition by small businesses, "taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors."[2] The Final Rule effective February 28, 2011 added a requirement for agencies to foster small business participation in their contracting. It required agencies to submit a plan for fostering small business participation to USDOT in early 2012. USDOT also identifies the following potential strategies for fostering small business participation:

- Establishing a race- and gender-neutral small business set-aside for prime contracts under a stated amount (e.g., $1 million);
- Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts; and
- Unbundling large contracts to allow small businesses more opportunities to bid for smaller contracts.

[2] 49 CFR Part 26.39(a).

In order to facilitate small business participation, INDOT implements a number of efforts including:

- Requesting that prime contractors complete Prime Contractor Voluntary Small Business Participation forms when they are partnering with small businesses on INDOT contracts, regardless of whether the small businesses are DBE-certified. USDOT approved that effort as an acceptable means to facilitate small business participation in 2012;
- Avoiding packaging multiple, relatively unrelated projects into the same requests for proposals (RFPs) and instead packaging RFPs in a more project-specific manner. That strategy generally results in smaller capacity requirements for prequalification;
- Allowing construction and professional services businesses to become prequalified for specialty work designations in addition to larger predefined work types; and
- Waiving the prequalification requirements for subcontractors whose unearned work total is $300,000 or below.

In addition, Chapter 10 of the report outlines many of INDOT's current and planned race- and gender-neutral measures and provides examples of measures that other organizations in Indiana have implemented. INDOT should review that information and consider implementing measures that the agency deems to be effective. INDOT should also review legal and budgetary issues in considering different measures.

Prohibition of DBE quotas and set-asides for DBEs unless in limited and extreme circumstances – 49 CFR Part 26.43. DBE quotas are prohibited under the Federal DBE Program, and DBE set-asides can only be used in extreme circumstances. INDOT does not currently use DBE quotas or set-asides in any way as part of its implementation of the Federal DBE Program.

Setting overall DBE goals – 49 CFR Part 26.45. In the Final Rule effective February 28, 2011, USDOT changed how often agencies that implement the Federal DBE Program are required to submit overall DBE goals. As discussed in Chapter 1, agencies such as INDOT now need to develop and submit overall DBE goals every three years. Chapter 9 uses data and results from the disparity study to provide INDOT with information that could be useful in developing its next overall DBE goal submission.

Analysis of reasons for not meeting overall DBE goal – 49 CFR Part 26.47(c). Another addition to the Federal DBE Program made under The Final Rule effective February 28, 2011 requires agencies to take the following actions if their DBE participation for a particular fiscal year is less than their overall goal for that year:

- Analyze the reasons for the difference in detail; and
- Establish specific steps and milestones to address the difference and enable the agency to meet the goal in the next fiscal year.

Based on information about awards and commitments to DBE-certified businesses, INDOT has not met its DBE goal in recent years. In federal fiscal years 2010 through 2015, DBE awards and

commitments that INDOT made on FHWA-funded contracts were below its overall DBE goal by an average of 2.9 percentage points.

Need for separate accounting for participation of potential DBEs. In accordance with guidance in the Federal DBE Program, BBC's analysis of the overall DBE goal in the disparity study includes DBEs that are currently certified and minority- and woman-owned businesses that could *potentially* be DBE-certified based on revenue standards (i.e., potential DBEs).[3] Agencies can explore whether one reason why they have not met their overall DBE goals is because they are not counting the participation of potential DBEs. USDOT might then expect an agency to explore ways to further encourage potential DBEs to become DBE-certified as one way of closing the gap between reported DBE participation and its overall DBE goal. In order to have the information to explore that possibility, INDOT should consider:

- Developing a system to collect information on the race/ethnicity and gender of the owners of all businesses—not just certified DBEs—participating as prime contractors or subcontractors in FHWA-funded contracts;
- Developing internal reports for the participation of all minority- and woman-owned businesses (based on race/ethnicity and gender of ownership; annual revenue; and other factors such as whether the business has been denied DBE certification in the past) in FHWA-funded contracts; and
- Continuing to track participation of certified DBEs on FHWA-funded contracts per USDOT reporting requirements.

Other steps to evaluate how INDOT might better meet its overall DBE goal. Analyzing the participation of potential DBEs is one step among many that INDOT might consider taking when examining any differences between DBE participation and its overall DBE goal. Based on a comprehensive review, INDOT must establish specific steps and milestones to correct any problems it identifies to enable it to better meet its overall DBE goal in the future.[4]

Maximum feasible portion of goal met through neutral program measures – 49 CFR Part 26.51(a). As discussed in Chapter 10, INDOT must meet the maximum feasible portion of its overall DBE goal through the use of race- and gender-neutral program measures. INDOT must project the portion of its overall DBE goal that could be achieved through such measures. The agency should consider the information and analytical approaches presented in Chapter 10 when making such projections.

Use of DBE contract goals – 49 CFR Part 26.51(d). The Federal DBE Program requires agencies to use race- and gender-conscious measures—such as DBE contract goals—to meet any portion of their overall DBE goals that they do not project being able to meet using race- and gender-neutral measures. Based on information from the disparity study and other available information, INDOT should assess whether the continued use of DBE contract goals is necessary

[3] Note that minority- and woman-owned businesses that could be DBE-certified but that are not currently certified are counted as part of calculating the overall DBE goal. However, the participation of those businesses is not counted as part of INDOT's DBE participation reports.

[4] 49 CFR Part 26.47(c)(2).

in the future to meet any portion of its overall DBE goal. USDOT guidelines on the use of DBE contract goals, which are presented in 49 CFR Part 26.51(e), include the following guidance:

- DBE contract goals may only be used on contracts that have subcontracting possibilities;
- Agencies are not required to set DBE contract goals on every FHWA-funded contract;
- During the period covered by the overall DBE goal, an agency must set DBE contract goals so that they will cumulatively result in meeting the portion of the overall DBE goal that the agency projects being unable to meet through race- and gender-neutral measures;
- An agency's DBE contract goals must provide for participation by all DBE groups eligible to participate in race- and gender-conscious measures and must not be subdivided into group-specific goals; and
- An agency must maintain and report data on DBE participation separately for contracts that include and do not include DBE contract goals.

If INDOT determines that it needs to continue using DBE contract goals on FHWA-funded projects, then it should also evaluate which DBE groups should be considered eligible for those goals. If INDOT decides to consider only certain DBE groups (e.g., groups that INDOT determines to be *underutilized* DBEs) as eligible to participate in DBE contract goals, it must submit a waiver request to FHWA.

Some individuals participating in in-depth interviews and public meetings made comments related to the use of race- and gender-conscious measures such as DBE contract goals:

- Several minority- and woman-owned businesses commented that race- and gender-conscious measures help their businesses get their "foot in the door" with prime contractors. A few minority- and woman-owned businesses indicated that one of the primary reasons that their businesses get work at all is because of such measures.
- Some interviewees suggested that race- and gender-conscious measures should only apply to those groups that experience discrimination. Many interviewees also indicated that they are aware of several fraudulent businesses that are taking advantage of such measures.

INDOT should consider those comments if it determines that it is appropriate to use DBE contract goals on FHWA-funded contracts in the future.

Flexible use of any race- and gender-conscious measures – 49 CFR Part 26.51(f).

State and local agencies must exercise flexibility in any use of race- and gender-conscious measures such as DBE contract goals. For example, if INDOT determines that DBE participation exceeds its overall DBE goal for a fiscal year, it must reduce its use of DBE contract goals to the extent necessary. If it determines that it will fall short of the overall DBE goal in a fiscal year, then it must make appropriate modifications in the use of race- and gender-neutral and race- and gender-conscious measures to allow it to meet its overall DBE goal in the following year. If INDOT observes increased DBE participation (relative to availability) on contracts to which race- and gender-conscious measures do not apply, the agency might consider changing its projection of how much of its overall DBE goal it can achieve through the use of race- and gender-neutral measures in the future.

Good faith efforts procedures – 49 CFR Part 26.53. USDOT has provided guidance for agencies to review good faith efforts, including materials in Appendix A of 49 CFR Part 26. INDOT's current implementation of the Federal DBE Program outlines the good faith efforts process that it uses for DBE contract goals. The Final Rule effective February 28, 2011 updated requirements for good faith efforts when agencies use DBE contract goals. INDOT should review 49 CFR Part 26.53 and The Final Rule to ensure that its good faith efforts procedures are consistent with federal regulations.

INDOT requires contractors to submit good faith efforts documentation and written confirmation in the event that bidders' efforts to include sufficient DBE participation were unsuccessful. Factors that are considered by INDOT in evaluating good faith efforts include:

- A bidder's solicitation process;
- Whether a bidder has selected portions of work to be performed by DBEs or has broken out portions of work into more feasible units in order to increase the likelihood that that the DBE goal will be achieved;
- Whether a bidder has negotiated in good faith with interested DBEs in an effort to facilitate DBE participation;
- Whether a bidder has performed a comparative cost analysis while understanding that there may be additional costs involved in finding and using DBEs as long as the costs are not excessive and unreasonable; and
- Taking into account the performance of other bidders in meeting a DBE contract goal.

Perfunctory efforts are not considered good faith efforts. Determining the sufficiency of bidders' good faith efforts is at the agency's discretion and using quantitative formulas is not required. On multiple occasions during the study period, INDOT accepted prime contractors' good faith efforts in lieu of actual subcontract commitments with DBEs. Several individuals participating in in-depth interviews and public meetings made comments related to good faith efforts. In general, many minority- and woman-owned businesses indicated that prime contractors often fail to make genuine efforts to use minority- and woman-owned businesses.

- Several participants indicated that the current race- and gender-conscious measures do not have incentives for prime contractors to make anything more than perfunctory good faith efforts in order to comply with the program. Prime contractors are not incentivized to seek meaningful participation of minority- and woman-owned businesses on projects.
- Several minority- and woman-owned businesses indicated that prime contractors have listed their businesses on project bids—sometimes without their knowledge—with no intention of actually using them on those projects but only to meet goals at the time of award.

INDOT might review such concerns further when evaluating ways to improve its current implementation of the Federal DBE Program. It should also review legal issues including state contracting laws and whether certain program options would meet USDOT regulations.

Counting DBE and MBE/WBE participation – 49 CFR Part 26.55. 49 CFR Part 26.55 describes how agencies should count DBE participation and evaluate whether bidders have met DBE contract goals. Federal regulations also give specific guidance for counting the participation of different types of DBE suppliers and trucking companies. Section 26.11 discusses the Uniform Report of DBE Awards or Commitments and Payments. INDOT currently tracks that information for DBE-certified businesses but not for uncertified minority- and woman-owned businesses or potential DBEs. As discussed above, INDOT should consider developing procedures and databases to consistently track participation of minority- and woman-owned businesses and potential DBEs in the contracts that the agency awards in addition to certified businesses. Such measures will help the agency track the effectiveness of its efforts to encourage DBE participation. If applicable, INDOT should also consider collecting important information regarding any shortfalls in annual DBE participation including preparing participation reports for all minority- and woman-owned businesses (not just those that are DBE-certified). INDOT should consider collecting and using the following information:

- Databases that BBC developed as part of the disparity study;
- Contractor/consultant registration documents from businesses working with INDOT as prime contractors or subcontractors including information about the race/ethnicity and gender of their owners;
- Prime contractor and subcontractor participation on agency contracts;
- Reports on the participation of certified DBEs in FHWA-funded contracts as required by the Federal DBE Program;
- Subcontractor participation data (for all tiers and suppliers) for all businesses regardless of race/ethnicity, gender, or certification status;
- Invoices for prime contractors and subcontractors;
- Descriptions of the areas of contracts on which subcontractors worked; and
- Subcontractors' contact information and committed dollar amounts from prime contractors at the time of contract award.

INDOT should consider maintaining the above information for some minimum amount of time (e.g., five years). INDOT should also consider establishing a training process for all staff that is responsible for managing and entering contract and vendor data. Training should convey data entry rules and standards and ensure consistency in the data entry process.

DBE certification – 49 CFR Part 26 Subpart D. INDOT is responsible for all DBE certifications in the state of Indiana. INDOT also maintains all of the DBE certification records for the state of Indiana. INDOT's certification process is designed to comply with 49 CFR Part 26 Subpart D. As INDOT continues to work with DBE-certified businesses, the agency should consider ensuring that it continues to certify all groups that the Federal DBE Program presumes to be socially and economically disadvantaged in a manner that is consistent with federal regulations.

Many business owners and managers participating in in-depth interviews and public hearings commented on the DBE certification process. Some business owners felt that the certification

process was reasonable and relatively easy. However, other business owners were highly critical of the certification process. A number of business owners reported that the process was difficult to understand and very time consuming. Appendix E provides other perceptions of business owners that have considered DBE certification or that have gone through the certification process. INDOT appears to follow federal regulations concerning DBE certification, which requires collecting and reviewing considerable information from program applicants. However, the agency might research other ways to make the certification process easier for potential DBEs.

Monitoring changes to the Federal DBE Program. Federal regulations related to the Federal DBE Program change periodically, such as with the DBE Program Implementation Modifications Final Rule issued on October 2, 2014 and the Final Rule issued on February 28, 2011. INDOT should continue to monitor such developments and ensure that the agency's implementation of the Federal DBE Program is in compliance with federal regulations. Other transportation agencies' implementations of the Federal DBE Program are under review in federal district courts. INDOT should also continue to monitor court decisions in those and other relevant cases (for details see Appendix B).

B. Additional Considerations

Based on disparity study results and the study team's review of INDOT's contracting practices and program measures, BBC provides additional considerations that the agency should make as it works to refine its compliance with the State of Indiana's MBE/WBE Program and the Federal DBE Program. In making those considerations, INDOT should also assess whether additional resources or changes in state law or internal policy may be required.

Networking and outreach. INDOT hosts and participates in many networking and outreach events that include information about marketing; the DBE and MBE/WBE certification processes; doing business with the agency; and available bid opportunities. INDOT should consider continuing those efforts but might also consider broadening its efforts to include more partnerships with local trade organizations and other public agencies such as the Indianapolis Black Chamber of Commerce; Hispanic Business Council; and various cities and townships. INDOT might also consider creating a consortium of local organizations and public agencies that would jointly host quarterly outreach and networking events and training sessions for businesses seeking public sector contracts.

Subcontract data. INDOT maintains comprehensive data on subcontracts that are associated with the prime contracts that it awards. INDOT could consider augmenting the subcontract data that it maintains with information about the amounts that subcontractors are actually paid on INDOT subcontracts. INDOT should consider requiring prime contractors to submit subcontractor payment data as part of the invoicing process and as a condition of receiving payment. Collecting subcontractor payment information will help ensure that INDOT monitors the participation of minority- and woman-owned businesses as accurately as possible.

Unbundling Large Contracts. In general, minority- and woman-owned businesses exhibited reduced availability for relatively large contracts that INDOT awarded during the study period. In addition, as part of in-depth interviews and public forums, several minority- and woman-

owned businesses reported that the size of government contracts often serves as a barrier to their success (for details, see Appendix E). To further encourage the participation of small businesses—including many minority- and woman-owned businesses—INDOT should consider making efforts to unbundle relatively large contracts into several smaller contracts. Doing so would result in that work being more accessible to small businesses, which in turn might increase opportunities for minority- and woman-owned businesses and result in greater minority- and woman-owned business participation.

Prime Contract Opportunities. Disparity analysis results indicated substantial disparities for most racial/ethnic and gender groups on the prime contracts that INDOT awarded during the study period. INDOT` might consider setting aside small prime contracts for small business bidding to encourage the participation of minority- and woman-owned businesses as prime contractors. Indiana state code already allows state agencies to set aside certain construction and goods and support services contracts for small businesses and allows state agencies to use small business price preferences for those purchases.[5,6] To implement small business contracting programs, INDOT would need to develop a small business certification program. It might use the same economic eligibility criteria that already exist in Indiana state code.[7]

Subcontract opportunities. Subcontracts represent accessible opportunities for minority- and woman-owned businesses to become involved in public contracting. However, subcontracting accounted for a relatively small percentage of the total contracting dollars that INDOT awarded during the study period. INDOT could consider implementing a program that requires prime contractors to include certain levels of subcontracting as part of their bids and proposals. For each contract to which the program applies, INDOT would set a minimum subcontracting percentage based on the type of work involved, the size of the project, and other factors. Prime contractors bidding on the contract would be required to subcontract a percentage of the work equal to or exceeding the minimum for their bids to be responsive. If INDOT were to implement such a program, the entity should include flexibility provisions such as a good faith efforts process.

Goods and support services contracts. Disparity analysis results indicated substantial disparities for all racial/ethnic and gender groups on goods and support services contracts that INDOT's Procurement Division awarded during the study period. Although those contracts are typically state-funded and the state's MBE/WBE program applies to them, INDOT does not enforce the use of MBE/WBE contract goals when awarding contracts through its Procurement Division. INDOT should consider working with the Procurement Division to explore race- and gender-neutral, and if appropriate, race- and gender-conscious program measures that might better encourage the participation of minority- and woman-owned businesses on goods and support services contracts in the future.

---

[5] IC 4-13.6-2-11.

[6] IC 5-22-14.

[7] IC 5-22-15.

DBE and MBE/WBE contract goals. INDOT uses DBE and MBE/WBE contract goals on many of the contracts that it awards. Prime contractors can meet those goals by either making subcontracting commitments with certified DBE or MBE/WBE subcontractors at the time of bid or by showing that they made all reasonable good faith efforts to fulfill the goals but could not do so. Disparity analysis results indicated that most racial/ethnic and gender groups did not show disparities on contracts to which INDOT applied DBE or MBE/WBE contract goals during the study period. In contrast, most racial/ethnic and gender groups showed substantial disparities on contracts to which INDOT did not apply DBE or MBE/WBE contract goals. INDOT should consider continuing its use of DBE and MBE/WBE contract goals in the future. The agency will need to ensure that the use of those goals is narrowly tailored and consistent with other relevant legal standards (for details, see Chapter 2 and Appendix B).

Prompt payment policies. Indiana state law requires state agencies to pay prime contractors within 35 days of agencies receiving invoices.[8] In addition, INDOT requires prime contractors to pay their subcontractors within 10 days of receiving payment from the agency. As part of in-depth interviews and public forums, several businesses—including many minority- and woman-owned businesses—reported difficulties with receiving payment in a timely manner on government contracts, particularly when they work as subcontractors (for details, see Appendix E). In light of such comments, INDOT should consider reinforcing its prompt payment policies with its procurement staff and with prime contractors. Doing so might help ensure that both prime contractors and subcontractors receive payment in a timely manner.

[8] IC 5-17-5.

APPENDIX A.
Definitions of Terms

Appendix A defines terms that are useful to understanding the 2015-16 Indiana Department of Transportation Disparity Study report. The following definitions are only relevant in the context of this report.

Anecdotal Information

Anecdotal information includes personal qualitative accounts and perceptions of specific incidents—including any incidents of discrimination—told from individual interviewees' or participants' perspectives.

Availability Analysis

An availability analysis assesses the percentage of dollars that one might expect a specific group of businesses to receive on contracts that a particular entity awards. The availability analysis in this report is based on various characteristics of potentially available businesses and of contract elements that the Indiana Department of Transportation and other entities awarded during the study period.

Business

A business is a for-profit company, including all of its establishments or locations.

Business Listing

A business listing is a record in the Dun & Bradstreet database or other database of business information. A Dun & Bradstreet record is considered a *listing* until the study team determines that the listing actually represents a business establishment with a working phone number.

Business Establishment

A business establishment is a place of business with an address and a working phone number. A single business, or firm, can have many business establishments, or locations.

Consultant

A consultant is a business performing a professional services contract.

Contract

A contract is a legally binding relationship between the seller of goods or services and a buyer. The study team often treats the term "contract" synonymously with "procurement."

Contract Element

A contract element is either a prime contract or a subcontract.

Contractor

A contractor is a business performing a construction contract.

Control

Control means exercising management and executive authority of a business.

Disadvantaged Business Enterprise (DBE)

A DBE is a business that is owned and controlled by one or more individuals who are socially and economically disadvantaged according to the guidelines in the Federal DBE Program (49 CFR Part 26) and that is certified as such through the Indiana Department of Transportation. The following groups are presumed to be socially and economically disadvantaged according to the Federal DBE Program:

- Asian Pacific Americans;
- Black Americans;
- Hispanic Americans;
- Native Americans;
- Subcontinent Asian Americans; and
- Women of any race or ethnicity.

A determination of economic disadvantage also includes assessing business' gross revenues and business owners' personal net worth (maximum of $1.32 million excluding equity in a home and in the business). Some minority- and woman-owned businesses do not qualify as DBEs because of gross revenue or net worth requirements. Businesses owned by non-Hispanic white men can also be certified as DBEs if those businesses meet the requirements in 49 CFR Part 26.

Disparity

A disparity is a difference or gap between an actual outcome and some benchmark. In this report, the term "disparity" refers to a difference between the participation, or utilization, of a specific group of businesses in Indiana Department of Transportation contracting and the availability of those businesses for that work.

Disparity Analysis

A disparity analysis examines whether there are any differences between the participation, or utilization, of a specific group of businesses in Indiana Department of Transportation contracting and the availability of those businesses for that work.

Disparity Index

A disparity index is computed by dividing the actual participation, or utilization, of a specific group of businesses in Indiana Department of Transportation contracting by the availability of those businesses for that work and multiplying the result by 100. Smaller disparity indices indicate larger disparities.

Dun & Bradstreet (D&B)

D&B is the leading global provider of lists of business establishments and other business information for specific industries within specific geographical areas (for details, see www.dnb.com).

Enterprise

An enterprise is an economic unit that could be a for-profit business or business establishment; a nonprofit organization; or a public sector organization. It is designed to increase the participation of minority- and woman-owned businesses in United States Department of Transportation-funded contracts.

Federal DBE Program

The Federal DBE Program was established by the United States Department of Transportation after enactment of the Transportation Equity Act for the 21st Century (TEA-21) as amended in 1998. Regulations for the Federal DBE Program are set forth in 49 CFR Part 26.

Federal Highway Administration (FHWA)

The FHWA is an agency of the United States Department of Transportation that works with state and local governments to construct, preserve, and improve the National Highway System; other roads eligible for federal aid; and certain roads on federal and tribal lands.

Federally-funded Contract

A federally-funded contract is any contract or project funded in whole or in part with United States Department of Transportation financial assistance including loans. In this study, the study team uses the term "federally-funded contract" synonymously with "USDOT-funded contract" or "FHWA-funded contract."

Firm

See "business."

Indiana Department of Administration (IDOA)

IDOA is an Indiana state agency that provides support and other services to other state agencies throughout Indiana. One of IDOA's functions is to operate the State of Indiana's Minority and Women's Business Enterprises Program.

Indiana Department of Transportation (INDOT)

The Indiana Department of Transportation (INDOT) is responsible for planning, building, maintaining, and operating the transportation and highway system throughout Indiana. It also operates the Unified Certification Program and is responsible for DBE certification for the entire state of Indiana.

Industry

An industry is a broad classification for businesses providing related goods or services (e.g., *construction* or *professional services*).

Majority-owned Business

A majority-owned business is a for-profit business that is owned and controlled by non-Hispanic white men.

Minority

A minority is an individual who identifies with one of the racial/ethnic groups specified in the State of Indiana's Minority and Women's Business Enterprises Program—Asian Americans, Black Americans, Hispanic Americans, Native Americans, and other minority groups.

Minority-owned Business

A minority-owned business is a business with at least 51 percent ownership and control by individuals who identify themselves with one of the racial/ethnic groups specified in the State of Indiana's Minority and Women's Business Enterprises Program—Asian Americans, Black Americans, Hispanic Americans, and Native Americans. A business does not have to be certified by IDOA to be considered a minority-owned business. (The study team considered businesses owned by minority women as minority-owned businesses.)

Minority-owned Business Enterprise (MBE)

An MBE is a minority-owned business that has been certified as such by IDOA. No revenue or net worth assessments are associated with IDOA's MBE certification process.

Non-DBE

A non-DBE is a minority- or woman-owned business or a majority-owned business that is not certified as a DBE, regardless of the race/ethnicity or gender of the owner.

Non-response Bias

Non-response bias occurs in survey research when participants' responses to survey questions theoretically differ from the potential responses of individuals who did not participate in the survey.

Potential DBE

A potential DBE is a minority- or woman-owned business that is DBE-certified or appears that it could be DBE-certified (regardless of actual DBE certification) based on revenue requirements specified as part of the Federal DBE Program.

Prime Consultant

A prime consultant is a professional services business that performed a prime contract for an end user, such as INDOT.

Prime Contract

A prime contract is a contract between a prime contractor, or prime consultant, and an end user, such as INDOT.

Prime Contractor

A prime contractor is a construction business that performed a prime contract for an end user, such as INDOT.

Project

A project refers to a construction; professional services; or goods and support services endeavor that INDOT bid out during the study period. A project could include one or more prime contracts and corresponding subcontracts.

Race-and Gender-conscious Measures

Race-and gender-conscious measures are contracting measures that are specifically designed to increase the participation of minority- and woman-owned businesses. Businesses owned by members of certain racial/ethnic groups might be eligible for such measures but not other businesses. Similarly, businesses owned by women might be eligible but not businesses owned by men. An MBE contract goal is one example of a race- and gender-conscious measure. Note that the term is more accurately "race-, ethnicity-, and gender-conscious measures." However, for ease of communication, the study team uses the term "race- and gender-conscious measures."

Race- and Gender-neutral Measures

Race- and gender-neutral measures are measures that are designed to remove potential barriers for all businesses attempting to do work with an entity or measures specifically designed to increase the participation of small or emerging businesses, regardless of the race/ethnicity or gender of ownership. Race- and gender-neutral measures may include assistance in overcoming bonding and financing obstacles; simplifying bidding procedures; providing technical assistance; establishing programs to assist start-ups; and other methods open to all businesses, regardless of the race/ethnicity or gender of the owners. Note that the term is more accurately "race-, ethnicity-, and gender-neutral measures." However, for ease of communication, the study team uses the term "race- and gender-neutral measures."

Relevant Geographic Market Area

The relevant geographic market area is the geographic area in which the businesses to which INDOT awards most of its contracting dollars are located. The relevant geographic market area is also referred to as the "local marketplace." Case law related to minority- and woman-owned business programs requires disparity analyses to focus on the "relevant geographic market area." The relevant geographic market area for INDOT is the state of Indiana.

State-funded Contract

A state-funded contract is any contract or project that is wholly funded with non-federal funds—that is, they do not include United States Department of Transportation or any other federal funds.

State of Indiana Minority and Women's Business Enterprises (MBE/WBE) Program

The State of Indiana MBE/WBE Program, as described in administrative code 25 IAC 5, is designed to encourage the participation of minority- and woman-owned businesses in state contracting and to create a fair, competitive, and equitable environment for those businesses. The following groups are presumed to be socially and economically disadvantaged according to the MBE/WBE Program:

- Asian Americans;
- Black Americans;
- Hispanic Americans;
- Native Americans;
- Other minority groups; and
- Women of any race or ethnicity.

Businesses seeking MBE/WBE certification with the State of Indiana are required to submit an application to IDOA's MBE/WBE Division. The application requires businesses to submit various information including name and contact information; tax information; work specializations; and information about the owner's gender and ethnicity. IDOA's MBE/WBE Division reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required information.

Statistically Significant Difference

A statistically significant difference refers to a quantitative difference for which there is a 0.95 probability that chance can be correctly rejected as an explanation for the difference (meaning that there is a 0.05 probability that chance in the sampling process could correctly account for the difference).

Subconsultant

A subconsultant is a professional services business that performed services for a prime consultant as part of a larger contract.

Subcontract

A subcontract is a contract between a prime contractor or prime consultant and another business selling goods or services to the prime contractor or prime consultant as part of a larger contract.

Subcontractor

A subcontractor is a construction business that performed services for a prime contractor as part of a larger contract.

Subindustry

A subindustry is a specific classification for businesses providing related goods or services within a particular industry (e.g., "water, sewer, and utility lines" is a subindustry of *construction*).

United States Departments of Transportation (USDOT)

USDOT is a federal cabinet department of the United States government that oversees federal highway, air, railroad, maritime, and other transportation administration functions. FHWA is a USDOT agency.

Utilization

Utilization refers to the percentage of total contracting dollars that were associated with a particular set of contracts that went to a specific group of businesses.

Vendor

A vendor is a business that sells goods, either to a prime contractor or prime consultant or to an end user, such as INDOT.

Woman-owned Business

A woman-owned business is a business with at least 51 percent ownership and control by non-Hispanic white women. A business does not have to be certified by IDOA to be considered a woman-owned business. (The study team considered businesses owned by minority women as minority-owned businesses.)

Woman-owned Business Enterprise (WBE)

A WBE is a woman-owned business that has been certified as such by IDOA. No revenue or net worth assessments are associated with IDOA's WBE certification process.

APPENDIX B.
Table of Contents

TABLE OF CONTENTS i

APPENDIX B. LEGAL FRAMEWORK AND ANALYSIS 1

A. Introduction 1

B. U.S. Supreme Court Cases 4

1. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) 4

2. *Adarand Constructors, Inc. v. Pena* ("*Adarand I*"), 515 U.S. 200 (1995) 6

C. The Legal Framework Applied to State and Local Government MBE/WBE and DBE Programs and the Federal DBE Program 6

1. Strict Scrutiny Analysis 6

2. Intermediate Scrutiny Analysis. 18

3. Federal DBE Program. 19

4. Pending Cases (at the time of this report). 25

D. Recent Decisions Involving State or Local Government MBE/WBE DBE Programs and the Federal DBE Program in the Seventh Circuit Court of Appeals 26

1. *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 (7th Cir. 2007) 26

2. *Northern* Contracting, *Inc. v. Illinois*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), aff'd 473 F.3d 715 (7th Cir. 2007) 28

3. *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004) 34

4. *Midwest Fence Corporation v. United States Department of Transportation and Federal Highway Administration, the Illinois Department of Transportation, the Illinois State Toll Highway Authority, et al.*, 2015 WL 1396376 (N.D. Ill, March 24, 2015), *appeal pending* in the U.S. Court of Appeals, Seventh Circuit, Docket Number 15-1827. 36

5. *Dunnet Bay Construction Company v. Gary Hannig*, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. Feb 12, 2014), *appeal pending* in U.S. Court of Appeals for the Seventh Circuit, Docket No. 14-1493. 46

6. *Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc.*, 460 F.3d 859 (7th Cir. 2006) 51

7. *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) 52

8. *Milwaukee County Pavers, Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991) 53

9. *The Builders Ass'n of Greater Chicago v. The City of Chicago*, 298 F. Supp.2d 725 (N.D. Ill. 2003) 56

10. *Indianapolis Minority Corrections Assoc., Inc. v. Wiley*, 1998 WL 1988826 (S.D. Ind. 1998) 57

E. Recent Decisions Involving State or Local Government MBE/WBE Programs in Other Jurisdictions 61

Recent Decisions in Federal Circuit Courts of Appeal 61

1. *H. B. Rowe Co., Inc. v. W. Lyndo Tippett*, NCDOT, et al., 615 F.3d 233 (4th Cir. 2010) 61

2. *Jana-Rock Construction, Inc. v. New York State Dept. of Economic Develo*pment, 438 F.3d 195 (2d Cir. 2006) 72

3. *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion) 73

4. *Concrete Works of Colorado, Inc. v. City and County of Denv*er, 321 F.3d 950 (10th Cir. 2003), cert. denied, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari) 75

5. *In re City of Memphis*, 293 F.3d 345 (6th Cir. 2002) 87

6. *Associated Gen. Contractors v. Drabik*, 214 F.3d 730 (6th Cir. 2000), affirming Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998) 88

7. *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) 88

8. *Eng'g Contractors Ass'n of S. Florida v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997) 89

9. *Monterey Mechanical v. Wilson*, 125 F.3d 702 (9th Cir. 1997) 100

10. *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity ("AGCC")*, 950 F.2d 1401 (9th Cir. 1991) 101

11. *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991) 104

Recent District Court Decisions 107

12. *H.B. Rowe Corp., Inc. v. W. Lyndo Tippett, North Carolina DOT, et al.*, 589 F. Supp.2d 587 (E.D.N.C. 2008), affirmed in part, reversed in part, and remanded, 615 F.3d 233 (4th Cir. 2010) 107

13. *Thomas v. City of Saint Paul*, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009) 113

14. *Thompson Building Wrecking Co. v. Augusta, Georgia*, No. 1:07CV019, 2007 WL 926153 (S.D. Ga. Mar. 14, 2007)(Slip. Op.) 115

15. *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, 333 F. Supp.2d 1305 (S.D. Fla. 2004) 116

16. *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307 (N.D. Fla. 2004) 121

17. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 218 F. Supp.2d 749 (D. Md. 2002) 123

18. *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000) 124

19. *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d 1232 (W.D. OK. 2001) 124

20. *Webster v. Fulton County*, 51 F. Supp.2d 1354 (N.D. Ga. 1999), a'ffd per curiam 218 F.3d 1267 (11th Cir. 2000) 129

21. *Associated Gen. Contractors v. Drabik*, 50 F. Supp.2d 741 (S.D. Ohio 1999) 132

22. *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp.2d 1308 (N.D. Fla. 1998) 132

F. Recent Decisions Involving the Federal DBE Program and its Implementation by State or Local Government Agencies in Other Jurisdictions 133

Recent Decisions in Federal Circuit Courts of Appeal 133

1. *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F. 3d 1187 (9th Cir. 2013) 133

2. *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006) 140

3. *Western States Paving Co. v. Washington DOT, US DOT & FHWA*, 2006 WL 1734163 (W.D. Wash. June 23, 2006) (unpublished opinion) 145

4. *Braunstein v. Arizona DOT*, 683 F.3d 1177 (9th Cir. 2012) 146

5. *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004) 148

6. *Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), aff'd 345 F.3d 964 (8th Cir. 2003) 151

7. *Gross Seed Co. v. Nebraska Department of Roads*, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), aff'd 345 F.3d 964 (8th Cir. 2003) 152

8. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, 534 U.S. 103 (2001) 153

Recent District Court Decisions 154

9. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014) *appeal pending* in the U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003 154

10. *Geyer Signal, Inc. v. Minnesota, DOT*, 2014 WL 1309092 (D. Minn. March 31, 2014) 159

11. *M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al.*, 2013 WL 4774517 (D. Mont.) (September 4, 2013) 167

12. *Geod Corporation v. New Jersey Transit Corporation, et. al.*, 746 F. Supp.2d 642, (D. N. J. October 19, 2010) 170

13. *Geod Corporation v. New Jersey Transit Corporation, et. seq.* 678 F.Supp.2d 276 (D.N.J. August 20, 2009) 175

14. *South Florida Chapter of the Associated General Contractors v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008) 179

15. *Klaver Construction, Inc. v. Kansas DOT*, 211 F. Supp.2d 1296 (D. Kan. 2002) 181

G. Recent Decisions and Authorities Involving Federal Procurement that may Impact MBE/WBE/DBE Programs 181

1. *Rothe Development Corp. v. U.S. Department of Defense, et al.*, 545 F.3d 1023 (Fed. Cir. 2008) 181

2. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 885 F.Supp.2d 237, (D.D.C. Aug. 15, 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014) 191

3. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 503 F. Supp.2d 262 (D.D.C. 2007) 199

APPENDIX B.
Legal Framework and Analysis

A. Introduction

In this Appendix, Holland & Knight LLP analyzes recent cases regarding state and local minority and woman-owned business enterprise ("MBE/WBE")[1] programs and disadvantaged business enterprise ("DBE") programs to provide a summary of the legal framework and analysis for the disparity study as applicable to the Indiana Department of Administration, Indiana Department of Transportation, Indiana University, Purdue University, Indiana State University, Ball State University, University of Southern Indiana, Ivy Tech Community College of Indiana, Vincennes University, and the Indianapolis Airport Authority (collectively referred to as "Indiana").

Appendix B begins with a brief review of the 1989 landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.[2] *Croson* sets forth the strict scrutiny constitutional analysis applicable in the legal framework for conducting a disparity study. This section also notes the United States Supreme Court decision in *Adarand Constructors, Inc. v. Pena*,[3] ("*Adarand I*"), which applied the strict scrutiny analysis set forth in *Croson* to federal programs that provide federal assistance to a recipient of federal funds. The Supreme Court's decisions in *Adarand I* and *Croson*, and subsequent cases and authorities provide the basis for the legal analysis in connection with the study for Indiana.

The legal framework analyzes and reviews in detail significant recent court decisions that have followed, interpreted and applied *Croson* and *Adarand I* to the present and that are applicable or instructive to Indiana's disparity study and the strict scrutiny analysis. This analysis reviews cases in the Seventh Circuit Court of Appeals, which is the federal appellate court controlling on Indiana, and recent decisions from other federal courts in this area of the law.

The analysis also reviews recent federal cases that have considered the validity of the Federal DBE Program[4], implementation of the DBE program by a state or local government agency recipient of federal funds, and state or local government DBE Programs, including *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al., ("AGC, SDC v. Cal. DOT"* or "*Caltrans*"[5]), *Northern Contracting,*

---

[1] Some of the case law and materials included herein also utilize the term Minority- and Female-Owned Business Enterprise, or MBE/FBE. The terms MBE/WBE and MBE/FBE are used interchangeably throughout this section.

[2] *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

[3] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

[4] Moving Ahead for Progress in the 21st Century Act ("MAP-21"), Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.; preceded by Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107. 49 CFR Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs ("Federal DBE Program").

[5] 713 F.3d 1187 (9th Cir. 2013).

Inc. v. Illinois DOT,[6] *Western States Paving Co. v. Washington State DOT,*[7] *Sherbrooke Turf, Inc. v. Minn DOT and Gross Seed v. Nebraska Department of Roads,*[8] *Adarand Construction, Inc. v. Slater*[9] *("Adarand VII"), Midwest Fence Corp. v. U.S. DOT and FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.,*[10] *Mountain States Holding Co., Inc. v. State of Montana, Montana DOT, et al.,*[11] *Geyer Signal, Inc. v. Minnesota DOT,*[12] *Dunnet Bay Construction Co. v. Illinois DOT, et al.,*[13] *M.K. Weeden Construction v. State of Montana, Montana DOT,*[14] *Geod Corporation v. New Jersey Transit Corporation,*[15], *South Florida Chapter of the A.G.C. v. Broward County, Florida.*[16]

The analyses of cases involving the Federal DBE program are instructive to Indiana and the disparity study because they are the most recent and significant decisions by federal courts construing the validity of government programs involving MBE/WBEs and DBEs and applying the "Compelling Interest" and "Narrow Tailoring" tests under the strict scrutiny analysis. They also are instructive in terms of the preparation of any legislation or programs by the Indiana agencies and the Indianapolis Airport Authority in this area concerning contracting and providing a non-discriminatory equal business opportunity for contractors. In addition, these cases consider disparity studies and set forth the legal framework applied to MBE/WBE programs, the Federal DBE Program, and state or local government DBE programs implementing the Federal DBE Program as recipients of federal financial assistance governed by 49 CFR Part 26.[17]

For example, in the most recent Federal Court of Appeals decision, the Ninth Circuit Court of Appeals in *AGC, San Diego Chapter, Inc. v. California DOT, et al.* held that Caltrans' DBE Program is

---

[6] 473 F.3d 715 (7th Cir. 2007).

[7] 407 F.3d 983 (9th Circ. 2005).

[8] 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).

[9] 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*").

[10] *Midwest Fence Corp. v. U.S. DOT, U.S. FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*, 2015 W.L. 1396376 (N.D. Ill., March 24, 2015), *appeal pending*; in the U.S. Court of Appeals for the Seventh Circuit, Docket Number 15-1827.

[11] *Mountain West Holding v. Montana*, 2014 WL 6686734 (D. Mont. 2014), *appeal pending* in the U.S. Court of Appeals for the Ninth Circuit, Docket Numbers 14-36097 and 15-35003.

[12] *Geyer Signal, Inc. v. Minnesota, DOT*, 2014 WL 1309092 (D. Minn. March 31, 2014).

[13] *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb 12, 2014), *appeal pending* in the U.S. Court of Appeals for the Seventh Circuit, Docket Number 14-1493.

[14] *M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al.* 2013 WL 4774517 (D. Mont.) (September 4, 2013).

[15] 766 F. Supp.2d 642, (D. N.J. 2010).

[16] 544 F. Supp.2d 1336 (S.D. Fla. 2008).

[17] See *AGC, San Diego Chapter, In. v. Cal. DOT*, 713 F.3d 1187 (9th Cir. 2013); *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007); *Western States Paving*, 407 F.3d 983 (9th Cir. 2005); *Sherbrooke Turf, Inc. v. Minn. DOT*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*").

constitutional.[18] The Court held that Caltrans' DBE Program was constitutional and survived strict scrutiny by: (1) having a strong basis in evidence of discrimination within the California transportation contracting industry based in substantial part on the evidence from the disparity study conducted for Caltrans; and (2) being "narrowly tailored" to benefit only those groups that have actually suffered discrimination.[19] Thus, this recent decision, along with the other cases involving local and state government DBE programs, is instructive to local government MBE/WBE programs.

In *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, Illinois State Toll Highway Authority,* the federal district court in Illinois, which is in the Seventh Circuit Court of Appeals like Indiana, upheld the constitutionality and validity of the Federal DBE Program and the implementation of the Federal DBE Program by the Illinois DOT and its DBE Program.[20] The court also upheld the validity of the DBE Program adopted by the Illinois Toll Highway Authority, which does not receive federal funds. The Toll Highway Authority adopted its own DBE Program, which although it mirrored the Federal DBE Program, does not implement the Federal DBE Program.[21]

The court in *Midwest Fence* held the Illinois DOT's DBE Program that implemented the Federal DBE Program was constitutional and satisfied the strict scrutiny test, which will be described below.[22] The court found that the Illinois DOT and the Toll Highway Authority followed the Seventh Circuit Court of Appeals' decision in *Northern Contracting, Inc. v. Illinois*.[23] The *Midwest Fence* decision by the district court has been appealed to the U.S. Court of Appeals for the Seventh Circuit, which appeal is pending at the time of this report.[24]

Also, recently the federal district court in Illinois in *Dunnet Bay Construction Co. v. Illinois DOT, et al.,* upheld the implementation of the Federal DBE Program by the Illinois DOT.[25] The court held Dunnet Bay lacked standing to challenge the IDOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting* decision because there

---

[18] *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT,* 713 F. 3d 1187 (9th Cir. 2013); *Associated General Contractor of America, San Diego Chapter, Inc. v. California DOT,* U.S.D.C. E.D. Cal., Civil Action No.S:09-cv-01622, Slip Opinion (E.D. Cal. April 20, 2011) *appeal dismissed based on standing, on other grounds* Ninth Circuit held Caltrans' DBE Program constitutional. *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.,* 713 F. 3d 1187, (9th Cir. April 16, 2013).

[19] The District Court had held that the "Caltrans DBE Program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry," satisfied the strict scrutiny standard, and is "clearly constitutional" and "narrowly tailored" under *Western States Paving* and the Supreme Court cases. *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT,* U.S.D.C., E.D., Cal., Civil Action No. 5:09-cv-01622, Slip Opinion Transcript of U.S. District Court at 42-56.

[20] *Midwest Fence,* 2015 W.L. 1396376 (N.D. Ill. March 24, 2015), *appeal pending.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id., see* Seventh Circuit Court of Appeals, Docket No. 15-1827.

[25] 2014 WL 552213 (C.D. Ill. 2014), *appeal pending* in U.S. Court of Appeals for the Seventh Circuit.

was no evidence IDOT exceeded its authority under federal law.[26] The *Dunnet Bay* decision by the district court also is an appeal to the U.S. Court of Appeals for the Seventh Circuit, which appeal is pending at the time of this report.[27]

B. U.S. Supreme Court Cases

1. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)

In *Croson*, the U.S. Supreme Court struck down the City of Richmond's "set-aside" program as unconstitutional because it did not satisfy the strict scrutiny analysis applied to "race-based" governmental programs. J.A. Croson Co. ("Croson") challenged the City of Richmond's minority contracting preference plan, which required prime contractors to subcontract at least 30 percent of the dollar amount of contracts to one or more Minority Business Enterprises ("MBE"). In enacting the plan, the City cited past discrimination and an intent to increase minority business participation in construction projects as motivating factors.

The Supreme Court held the City of Richmond's "set-aside" action plan violated the Equal Protection Clause of the Fourteenth Amendment. The Court applied the "strict scrutiny" standard, generally applicable to any race-based classification, which requires a governmental entity to have a "compelling governmental interest" in remedying past identified discrimination and that any program adopted by a local or state government must be "narrowly tailored" to achieve the goal of remedying the identified discrimination.

The Court determined that the plan neither served a "compelling governmental interest" nor offered a "narrowly tailored" remedy to past discrimination. The Court found no "compelling governmental interest" because the City had not provided "a strong basis in evidence for its conclusion that [race-based] remedial action was necessary."[28] The Court held the City presented no direct evidence of any race discrimination on its part in awarding construction contracts or any evidence that the City's prime contractors had discriminated against minority-owned subcontractors.[29] The Court also found there were only generalized allegations of societal and industry discrimination coupled with positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

Similarly, the Court held the City failed to demonstrate that the plan was "narrowly tailored" for several reasons, including because there did not appear to have been any consideration of race-neutral means to increase minority business participation in city contracting, and because of the

---

[26] *Id.*

[27] Seventh Circuit Court of Appeals, Docket No. 14-1493.

[28] 488 U.S. at 500, 510.

[29] 488 U.S. at 480, 505.

over inclusiveness of certain minorities in the "preference" program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.[30]

The Court stated that reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond was misplaced. There is no doubt, the Court held, that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute *prima facie* proof of a pattern or practice of discrimination" under Title VII.[31] But it is equally clear that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."[32]

The Court concluded that where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. The Court noted that "the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects."[33] "Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city."[34]

The Supreme Court stated that it did not intend its decision to preclude a state or local government from "taking action to rectify the effects of identified discrimination within its jurisdiction."[35] The Court held that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise."[36]

The Court said: "If the City of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion."[37] "Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria." "In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."[38]

---

[30] 488 U.S. at 507-510.

[31] 488 U.S. at 501, *quoting Hazelwood School Dist. v. United States,* 433 U.S. 299, 307–308, 97 S.Ct. 2736, 2741.

[32] 488 U.S. at 501 *quoting Hazelwood,* 433 U.S. at 308, n. 13, 97 S.Ct., at 2742, n. 13.

[33] 488 U.S. at 502.

[34] *Id.*

[35] 488 U.S. at 509.

[36] *Id.*

[37] 488 U.S. at 509.

[38] *Id.*

The Court further found "if the City could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the City could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."[39]

2. *Adarand Constructors, Inc. v. Pena* ("*Adarand I*"), 515 U.S. 200 (1995)

In *Adarand I*, the U.S. Supreme Court extended the holding in *Croson* and ruled that all federal government programs that use racial or ethnic criteria as factors in procurement decisions must pass a test of strict scrutiny in order to survive constitutional muster.

The cases interpreting *Adarand I* are the most recent and significant decisions by federal courts setting forth the legal framework for disparity studies as well as the predicate to satisfy the constitutional strict scrutiny standard of review, which applies to the implementation of the Federal DBE Program by recipients of federal funds and to local or state MBE/WBE programs.

C. The Legal Framework Applied to State and Local Government MBE/WBE and DBE Programs and the Federal DBE Program

The following provides an analysis for the legal framework focusing on recent key cases regarding state and local MBE/WBE programs, and the Federal DBE Program, and their implications for a disparity study. The recent decisions involving MBE/WBE and local and state DBE Programs are instructive to Indiana and the disparity study because they concern the strict scrutiny analysis and legal framework in this area of the law.

1. Strict Scrutiny Analysis

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.[40] The implementation of the Federal DBE Program by IDOT and the Indianapolis Airport Authority also is subject to strict scrutiny analysis. The strict scrutiny analysis is comprised of two prongs:

- The program must serve an established compelling governmental interest; and
- The program must be narrowly tailored to achieve that compelling government interest.[41]

---

[39] 488 U.S. at 492.

[40] *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Pena* (*Adarand I*), 515 U.S. 200, 227 (1995); See *Fisher v. University of Texas*, ___ U.S. ___, 133 S.Ct. 2411 (2013).

[41] *Adarand I*, 515 U.S. 200, 227 (1995); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *Associated Gen. Contractors of Ohio, Inc. v. Drabik ("Drabik II")*, 214 F.3d 730 (6th Cir. 2000); *Eng'g Contractors Ass'n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 990 (3d Cir. 1993).

a. The Compelling Governmental Interest Requirement

The first prong of the strict scrutiny analysis requires a governmental entity to have a "compelling governmental interest" in remedying past identified discrimination in order to implement a race- and ethnicity-based program. State and local governments cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions.[42] Rather, state and local governments must measure discrimination in their state or local market. However, that is not necessarily confined by the jurisdiction's boundaries.[43]

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.[44] The federal courts have held that Congress had ample evidence of discrimination in the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 C.F.R. Part 26).[45] Specifically, the federal courts found Congress "spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry."[46] The evidence found to satisfy the compelling interest standard included numerous congressional

---

[42] See *e.g., Concrete Works, Inc. v. City and County of Denver ("Concrete Works I")*, 36 F.3d 1513, 1520 (10th Cir. 1994).

[43] *Id.*

[44] *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 2015 WL 1396376, *appeal pending*.

[45] *Id.* In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so "outdated" so as to provide an insufficient basis in evidence for the Department of Defense program (*i.e.*, whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense ("DOD") regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting, Sherbrooke Turf, Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007 issued its order denying plaintiff *Rothe's* Motion for Summary Judgment and granting Defendant United States Department of Defense's Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Devel. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix (The Compelling Interest, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in *Sherbrooke Turf, Adarand VII*, and *Western States Paving* in upholding the constitutionality of the Federal DBE Program – was "stale" as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See the discussion of the 2008 Federal Circuit Court of Appeals decision in *Rothe* below in Section G. *See also* the discussion below in Section G of the 2012 district court decision in *DynaLantic Corp. v. U.S. Department of Defense, et al*, 885 F.Supp.2d 237, (D.D.C. 2012).

[46] *Sherbrooke Turf*, 345 F.3d at 970, (citing *Adarand VII*, 228 F.3d at 1167 – 76); *Western States Paving*, 407 F.3d at 992-93.

investigations and hearings, and outside studies of statistical and anecdotal evidence (*e.g.*, disparity studies).[47]

The evidentiary basis on which Congress relied to support its finding of discrimination that is instructive to local and state governments and their MBE/WBE programs, includes:

- ***Barriers to minority business formation.*** Congress found that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide, noting the existence of "good ol' boy" networks, from which minority firms have traditionally been excluded, and the race-based denial of access to capital, which affects the formation of minority subcontracting enterprise.[48]
- ***Barriers to competition for existing minority enterprises.*** Congress found evidence showing systematic exclusion and discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies precluding minority enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor's work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.[49]
- ***Local disparity studies.*** Congress found that local studies throughout the country tend to show a disparity between utilization and availability of minority-owned firms, raising an inference of discrimination.[50]
- ***Results of removing affirmative action programs.*** Congress found evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears, which courts have found strongly supports the government's claim that there are significant barriers to minority competition, raising the specter of discrimination.[51]
- ***MAP-21.*** In July 2012, Congress passed MAP-21, which made "Findings" that "discrimination and related barriers continue to pose significant obstacles for minority- and woman-owned businesses seeking to do business in federally-assisted surface transportation markets," and that the continuing barriers "merit the continuation" of the

---

[47] *See, e.g., Adarand VII*, 228 F.3d at 1167– 76; *see also Western States Paving*, 407 F.3d at 992 (Congress "explicitly relied upon" the Department of Justice study that "documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts"); *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 2015 WL 1396376, *appeal pending*.

[48] *Adarand VII*, 228 F.3d. at 1168-70; *Western States Paving*, 407 F.3d at 992; *see DynaLantic*, 885 F.Supp.2d 237; *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 2015 WL 1396376, *appeal pending; Geyer Signal*, 2014 WL 130909297 at *14..

[49] *Adarand VII* at 1170-72; *see DynaLantic, 885* F.Supp.2d 237; *Geyer Signal*, 2014 WL 1309092 at *14.

[50] *Id.* at 1172-74; *see DynaLantic*, 885 F.Supp.2d 237; *Midwest Fence Corp.*, 2015 WL 1396376, *appeal pending; Geyer Signal*, 2014 WL 1309092 at *14.

[51] *Adarand VII* at 1174-75; *Mountain West Holding*, 2014 WL 6686734, *appeal pending*.

Federal DBE Program.[52] Congress also found that it received and reviewed testimony and documentation of race and gender discrimination which "provide a strong basis that there is a compelling need for the continuation of the" Federal DBE Program.[53]

Burden of proof. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.[54] If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.[55] The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."[56]

Under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrow tailoring.[57] It is well established that "remedying the effects of past or present racial discrimination" is a compelling interest.[58] In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."[59]

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."[60] "An inference of discrimination may be made with empirical evidence that demonstrates 'a significant statistical disparity between a number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality's prime contractors.'"[61] Anecdotal

---

[52] Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

[53] *Id.* at § 1101(b)(1).

[54] See *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE +Program); *Adarand Constructors Inc. v. Slater* ("Adarand VII"), 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *Midwest Fence*, 2015 WL 1396376, *appeal pending*; *DynaLantic*, 885 F.Supp.2d 237; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

[55] *See, e.g., H.B. Rowe*, 615 F.3d at 241-2; *Concrete Works of Colo., Inc. v. City and County of Denver*, 321 F.3d 950, 959 (10th Cir. 2003); *Adarand VII*, 228 F.3d at 1166; *Eng'g Contractors Ass'n*, 122 F.3d at 916.

[56] *See, e.g., Adarand VII*, 228 F.3d at 1166; *Eng'g Contractors Ass'n*, 122 F.3d at 916; *see also Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721.

[57] *Id.; See also Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000).

[58] *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989).

[59] *Croson*, 488 U.S. at 500.

[60] *Midwest Fence*, 2015 W.L. 1396376 at *7 (N.D. Ill. 2015); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3rd at 1195-1200; *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994).

[61] *Midwest Fence*, 2015 W.L. 1396376 at *7, *quoting Concrete Works*; 36 F.3d 1513, 1522 (*quoting Croson*, 488 U.S. at 509).

evidence may be used in combination with statistical evidence to establish a compelling governmental interest.[62]

In addition to providing "hard proof" to support its compelling interest, the government must also show that the challenged program is narrowly tailored.[63] Once the governmental entity has shown acceptable proof of a compelling interest and remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.[64] The ultimate burden remains with the plaintiff to demonstrate the unconstitutionality of an affirmative-action program.[65]

To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own that rebuts the government's showing of a strong basis in evidence.[66] This rebuttal can be accomplished by providing a neutral explanation for the disparity between MBE/WBE/DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data.[67] Conjecture and unsupported criticisms of the government's methodology are insufficient.[68] The courts have held that mere speculation the government's evidence is insufficient or methodologically flawed does not suffice to rebut a government's showing.[69]

The courts have noted that "there is no 'precise mathematical formula to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark.'"[70] It has been held that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.[71] Instead, the Supreme Court stated that a government may meet its burden by relying on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its

---

[62] *Croson,* 488 U.S. at 509; *see, e.g., AGC, SDC v. Caltrons,* 713 R.3d at 1196; *Midwest Fence,* 2015 WL 1396376 at *7.

[63] *Adarand Constructors, Inc. v. Pena,* ("*Adarand III*"), 515 U.S. 200 at 235 (1995); *e.g., Majeske v. City of Chicago,* 218 F.3d at 820.

[64] *Majeske,* 218 F.3d at 820; *see, e.g. Wygant v. Jackson Bd. Of Educ.,* 476 U.S. 267, 277-78; *Midwest Fence,* 2015 WL 1396376 at *7; *DynaLantic,* 885 F.Supp.2d at 251.

[65] *Id.*

[66] *See e.g., H.B. Rowe v. North Carolina DOT* (4th Cir. 2010), 615 F.3d 233, at 241-242; *Concrete Works,* 321 F.3d 950, 959 (*quoting Adarand Constructors, Inc. vs. Slater,* 228 F.3d 1147, 1175 (10th Cir. 2000)); *Midwest Fence,* 2015 W.L. 1396376 at *7.

[67] *Id; See e.g., Engineering Contractors,* 122 F.3d at 916; *Contractors Association of E. Pa., Inc. v. City of Philadelphia,* 6 F.3d 990, 1007 (3d Cir. 1993); *Coral Construction, Co. v. King County,* 941 F.2d 910, 921 (9th Cir. 1991).

[68] *Id.*

[69] *H.B. Rowe,* 615 F.3d 233, at 242; *see Concrete Works,* 321 F.3d at 991.

[70] *H.B. Rowe,* 615 F.3d at 241, *quoting Rothe Dev. Corp. v. Dep't of Def.,* 545 F.3d 1023, 1049 (Fed. Cir. 2008) (*quoting W.H. Scott Constr. Co. v. City of Jackson,* 199 F.3d 206, 218 n. 11 (5th Cir. 1999)).

[71] *H.B. Rowe Co.,* 615 F.3d at 241; *see e.g., Concrete Works,* 321 F.3d at 958.

prime contractors.[72] It has been further held that the statistical evidence be "corroborated by significant anecdotal evidence of racial discrimination" or bolstered by anecdotal evidence supporting an inference of discrimination.[73]

Statistical evidence. Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state recipient level.[74] "Where gross statistical disparities can be shown, they alone in a proper case may constitute *prima facie* proof of a pattern or practice of discrimination."[75]

One form of statistical evidence is the comparison of a government's utilization of MBE/WBEs compared to the relative availability of qualified, willing and able MBE/WBEs.[76] The federal courts have held that a significant statistical disparity between the utilization and availability of minority- and woman-owned firms may raise an inference of discriminatory exclusion.[77] However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.[78]

Other considerations regarding statistical evidence include:

- ***Availability analysis***. A disparity index requires an availability analysis. MBE/WBE and DBE availability measures the relative number of MBE/WBEs and DBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.[79] There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,[80] "An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach."[81]

---

[72] *Croson*, 488 U.S. 509, *see e.g., H.B. Rowe*, 615 F.3d at 241.

[73] *H.B. Rowe*, 615 F.3d at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); *see e.g., AGC, San Diego v. Caltrans*, 713 F.3d at 1196.

[74] *See, e.g., Croson*, 488 U.S. at 509; *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Adarand VII*, 228 F.3d at 1166.

[75] *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977).

[76] *Croson*, 448 U.S. at 509; *see AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver* ("*Concrete Works II*"), 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736.

[77] *See, e.g., Croson*, 488 U.S. at 509; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *see Western States Paving*, 407 F.3d at 1001.

[78] *Western States Paving*, 407 F.3d at 1001.

[79] *See, e.g., Croson*, 448 U.S. at 509; 49 C.F.R. § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995.

[80] *Contractors Ass'n of Easton Pennsylvania, Inc. v. City of Philadelphia* ("*CAEP II*"), 91 F.3d 586, 603 (3d Cir. 1996).

[81] *Id.*

- ***Utilization analysis.*** Courts have accepted measuring utilization based on the proportion of an agency's contract dollars going to MBE/WBEs and DBEs.[82]
- ***Disparity index.*** An important component of statistical evidence is the "disparity index."[83] A disparity index is defined as the ratio of the percent utilization to the percent availability times 100. A disparity index below 80 has been accepted as evidence of adverse impact. This has been referred to as "The Rule of Thumb" or "The 80 percent Rule."[84]
- ***Two standard deviation test.*** The standard deviation figure describes the probability that the measured disparity is the result of mere chance. Some courts have held that a statistical disparity corresponding to a standard deviation of less than two is not considered statistically significant.[85]

Anecdotal evidence. Anecdotal evidence includes personal accounts of incidents, including of discrimination, told from the witness' perspective. Anecdotal evidence of discrimination, standing alone, generally is insufficient to show a systematic pattern of discrimination.[86] But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.[87] It has been held that anecdotal evidence of a local or state government's institutional practices that exacerbate discriminatory market conditions are often particularly probative.[88]

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender or believe they were treated fairly without regard to race, ethnicity, or gender;

---

[82] *See AGC, SDC v. Caltrans,* 713 F.3d at 1191-1197; *Eng'g Contractors Ass'n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

[83] *Eng'g Contractors Ass'n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

[84] *See, e.g., Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *AGC, SDC v. Caltrans,* 713 F.3d at 1191; *Rothe*, 545 F.3d at 1041; *Eng'g Contractors Ass'n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

[85] *Eng'g Contractors Ass'n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct.; *Peightal v. Metropolitan Eng'g Contractors Ass'n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

[86] See, *e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 924-25; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O'Donnel Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

[87] *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520; *Contractors Ass'n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

[88] *Concrete Works I*, 36 F.3d at 1520.

- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs on non-goal projects; and
- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.[89]
- Courts have accepted and recognize that anecdotal evidence is the witness' narrative of incidents told from his or her perspective, including the witness' thoughts, feelings, and perceptions, and thus anecdotal evidence need not be verified.[90]

b. The Narrow Tailoring Requirement

The second prong of the strict scrutiny analysis requires that a race- or ethnicity-based program or legislation implemented to remedy past identified discrimination in the relevant market be "narrowly tailored" to reach that objective.

The narrow tailoring requirement has several components and the courts analyze several criteria or factors in determining whether a program or legislation satisfies this requirement including:

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of numerical goals to the relevant labor market; and
- The impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.[91]

The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by recipients of federal funds be "narrowly tailored" to remedy identified discrimination in the particular recipient's contracting and procurement market.[92] The narrow tailoring requirement has several components.

It should be pointed out that in the *Northern Contracting* decision (2007), the Seventh Circuit Court of Appeals addressed a challenge to a state government's DBE program implementing the

---

[89] *See, e.g., AGC, SDC v. Caltrans, 713 F.3d at 1197l; Northern Contracting,* 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed,* 473 F.3d 715 (7th Cir. 2007); *e.g., Concrete Works,* 321 F.3d at 989; *Adarand VII,* 228 F.3d at 1166-76. For additional examples of anecdotal evidence, *see Eng'g Contractors Ass'n,* 122 F.3d at 924; *Concrete Works,* 36 F.3d at 1520; *Cone Corp. v. Hillsborough County,* 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic,* 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida,* 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

[90] *See, e.g., Concrete Works II,* 321 F.3d at 989; *Eng'g Contractors Ass'n,* 122 F.3d at 924-26; *Cone Corp.,* 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois,* 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

[91] *See, e.g., AGC, SDC v. Caltrans,* 713 F.3d at 1198-1199; *Rothe,* 545 F.3d at 1036; *Western States Paving,* 407 F3d at 993-995; *Sherbrooke Turf,* 345 F.3d at 971; *Adarand VII,* 228 F.3d at 1181; *Eng'g Contractors Ass'n,* 122 F.3d at 927 (internal quotations and citations omitted).

[92] *Western States Paving,* 407 F3d at 995-998; *Sherbrooke Turf,* 345 F.3d at 970-71.

Federal DBE Program. As a result, the Court cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT's program."[93] The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of Appeals decision in *Western States Paving* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis.

The Seventh Circuit Court of Appeals in *Northern Contracting* held that the state DOT's [Illinois DOT] application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.[94] The Seventh Circuit Court of Appeals analyzed IDOT's compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions and its use of race-neutral methods set forth in the federal regulations.[95] The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 C.F.R. Part 26).[96] Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.[97] See the discussion of the *Northern Contracting* decision below in Section D.[98]

Recently in *Dunnet Bay Construction Co. v. Illinois DOT*[99]*and Midwest Fence Corp. v. U.S. DOT, Illinois DOT, Illinois Toll Highway Authority*,[100] the district courts followed the *Northern Contracting* decision in upholding the validity of the DBE Programs adopted by the Illinois DOT and the Illinois Toll Highway Authority. The district courts ruled that these state agencies satisfied the strict scrutiny test as established in *Northern Contracting*.[101] These cases are instructive as the most recent cases analyzing race and gender conscious programs and disparity study evidence. Both of these cases are currently on appeal to the Seventh Circuit Court of Appeals, and the decisions are summarized in Section D below.

---

[93] 473 F.3d at 722.

[94] *Id.* at 722.

[95] *Id.* at 723-24.

[96] *Id.*

[97] *Id.; see, e.g., Geod Corp. v. New Jersey Transit Corp., et al.*, 746 F.Supp 2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

[98] In *Western States Paving*, the Ninth Circuit held the recipient of federal funds must have independent evidence of discrimination within the recipient's own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity-, or gender-conscious remedial action. Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny. *Western States Paving*, 407 F.3d at 997-98, 1002-03. The Seventh Circuit Court of Appeals in *Northern Contracting* stated in a footnote that the court in *Western States Paving* "misread" the decision in *Milwaukee County Pavers*. 473 F.3d at 722, n. 5.

[99] 2014 WL 552213, *appeal pending.*

[100] 2015 WL 1396376, *appeal pending.*

[101] 2015 WL 1396376, *appeal pending*; 2014 WL 552213, *appeal pending.*

In *Western States Paving*, the Ninth Circuit Court of Appeals found that even where evidence of discrimination is present in a recipient's market, a narrowly tailored program must apply only to those minority groups who have actually suffered discrimination. Thus, under a race- or ethnicity -conscious program, for each of the minority groups to be included in any race- or ethnicity-conscious elements, there must be evidence that the minority group suffered discrimination within the recipient's marketplace.[102]

To satisfy the narrowly tailored prong of the strict scrutiny analysis, it is instructive for local government MBE/WBE programs that the federal courts, which evaluated local and state DBE Programs in the context of the Federal DBE Program have held the following factors, are pertinent:

- Evidence of discrimination or its effects in the state Transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.[103]

The Eleventh Circuit described the "the essence of the 'narrowly tailored' inquiry [as] the notion that explicitly racial preferences ... must only be a 'last resort' option."[104] Courts have found that "[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake."[105]

Similarly, the Sixth Circuit Court of Appeals in *Associated Gen. Contractors v. Drabik ("Drabik II")*, stated: "*Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, "for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting ... or whether the program was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'"[106]

---

[102] 407 F.3d at 996-1000.

[103] See, *e.g.*, *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248.

[104] *Eng'g Contractors Ass'n*, 122 F.3d at 926 (internal citations omitted); *see also Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 264, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion); *Webster v. Fulton County*, 51 F. Supp.2d 1354, 1380 (N.D. Ga. 1999), *aff'd per curiam* 218 F.3d 1267 (11th Cir. 2000).

[105] *See Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *Western States Paving*, 407 F.3d at 993; *see also Adarand I*, 515 U.S. at 237-38.

[106] *Associated Gen. Contractors of Ohio, Inc. v. Drabik* ("Drabik II"), 214 F.3d 730, 738 (6th Cir. 2000).

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*[107] also found that race- and ethnicity-based measures should be employed as a last resort. The majority opinion stated: "Narrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives,' and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration."[108] The Court found that the District failed to show it seriously considered race-neutral measures.

The "narrowly tailored" analysis is instructive in terms of developing any potential legislation or programs that involve MBE/WBE/DBEs, or in connection with determining appropriate remedial measures to achieve legislative objectives.

Race-, ethnicity-, and gender-neutral measures. To the extent a "strong basis in evidence" exists concerning discrimination in a local or state government's relevant contracting and procurement market, the courts analyze several criteria or factors to determine whether a state's implementation of a race- or ethnicity-conscious program is necessary and thus narrowly tailored to achieve remedying identified discrimination. One of the key factors discussed above is consideration of race-, ethnicity- and gender-neutral measures.

The courts require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.[109] And the courts have held unconstitutional those race- and ethnicity-conscious programs implemented without consideration of race- and ethnicity-neutral alternatives to increase minority business participation in state and local contracting.[110]

The Court in *Croson* followed by decisions from federal courts of appeal found that local and state governments have at their disposal a "whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races."[111, 112]

Examples of race-, ethnicity-, and gender-neutral alternatives include, but are not limited to, the following:

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;

---

[107] 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007)

[108] 551 U.S. 701, 734-37, 127 S.Ct. at 2760-61; *see also Grutter v. Bollinger*, 539 U.S. 305 (2003).

[109] *See, e.g., AGC, SDC v. Caltrans, 713 F.3d at 1199*; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179; *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Coral Constr.*, 941 F.2d at 923.

[110] *See Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); *see also Eng'g Contractors Ass'n*, 122 F.3d at 927; *Virdi*, 135 Fed. Appx. At 268.

[111] *Croson*, 488 U.S. at 509-510.

[112] 49 C.F.R. § 26.51(a) requires recipients of federal funds to "meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation." *See, e.g., Adarand VII*, 228 F.3d at 1179; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972.

- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- "How to do business" seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.[113]

The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-, ethnicity-, and gender-neutral alternative, it does "require serious, good faith consideration of workable race-neutral alternatives."[114]

Additional factors considered under narrow tailoring. In addition to the required consideration of the necessity for the relief and the efficacy of alternative remedies (race- and ethnicity-neutral efforts), the courts require evaluation of additional factors as listed above.[115] For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;[116] (2) good faith efforts provisions;[117] (3) waiver provisions;[118] (4) a rational basis for goals;[119] (5) graduation provisions;[120] (6) remedies only for groups for

---

[113] *See, e.g., Croson*, 488 U.S. at 509-510; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; 49 C.F.R. § 26.51(b); *Eng'g Contractors Ass'n*, 122 F.3d at 927-29; 49 C.F.R. § 26.51(b).

[114] *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1199; citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Western States Paving*, 407 F.3d at 993.

[115] *Eng'g Contractors Ass'n*, 122 F.3d at 927.

[116] *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality* ("AGC of Ca."), 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

[117] *CAEP* I, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

[118] *CAEP* I, 6 F.3d at 1009; AGC of Ca., 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917.

[119] *Id.*

[120] *Id.*

which there were findings of discrimination;[121] (7) sunset provisions;[122] and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.[123]

2. Intermediate Scrutiny Analysis

Certain Federal Courts of Appeal apply intermediate scrutiny to gender-conscious programs.[124] The Courts have interpreted this standard to require that gender-based classifications be:

1. Supported by both "sufficient probative" evidence or "exceedingly persuasive justification" in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.[125]

Under the traditional intermediate scrutiny standard, the court reviews a gender-conscious program by analyzing whether the state actor has established a sufficient factual predicate for the claim that female-owned businesses have suffered discrimination, and whether the gender-conscious remedy is an appropriate response to such discrimination. This standard requires the state actor to present "sufficient probative" evidence in support of its stated rationale for the program.[126]

The Seventh Circuit Court of Appeals, however, in *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, did not hold there is a different level of scrutiny for gender discrimination or gender based programs. The Seventh Circuit Court of Appeals in *Builders Ass'n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors Ass'n.* [127]

Intermediate scrutiny, as interpreted by federal circuit courts of appeal other than the Seventh Circuit, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective. The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.[128] And the Eleventh Circuit has held that "[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program

---

[121] *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417.

[122] *Peightal*, 26 F.3d at 1559.

[123] *Coral Constr.*, 941 F.2d at 925.

[124] *See generally*, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification.")

[125] *Id.*

[126] *Id.*

[127] 256 F.3d 642, 644-45 (7th Cir 2001).

[128] *Coral Constr. Co.*, 941 F.2d at 931-932; *See Eng'g Contractors Ass'n*, 122 F.3d at 910.

only as a last resort .... Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market."[129]

3. Federal DBE Program

For those Indiana agencies that implement the Federal DBE Program, such as the Indiana DOT and the Indianapolis Airport Authority, the following summarizes recent Congressional actions and changes to the Federal regulations.

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.[130] Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21st Century ("TEA-21"), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998 - 2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 CFR Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in 2003, 2005 and 2012. The reauthorization of TEA-21 in 2005 was for a five year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 ("SAFETEA"). In July 2012, Congress passed the Moving Ahead for Progress in the 21st Century Act ("MAP-21").[131]

The Federal DBE Program as amended changed certain requirements for federal aid recipients and accordingly changed how recipients of federal funds implemented the Federal DBE Program for federally-assisted contracts. The federal government determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual federal aid recipients by the regulations. State and local governments are not required to implement race- and gender-based measures where they are not necessary to achieve DBE goals and those goals may be achieved by race- and gender-neutral measures.[132]

The Federal DBE Program established responsibility for implementing the DBE Program to state and local government recipients of federal funds. A recipient of federal financial assistance must set an annual DBE goal specific to conditions in the relevant marketplace. Even though an overall annual 10 percent aspirational goal applies at the federal level, it does not affect the goals established by individual state or local governmental recipients. The Federal DBE Program outlines certain steps a state or local government recipient can follow in establishing a goal, and

---

[129] 122 F.3d at 929 (internal citations omitted.)

[130] *Appendix-The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,050, 26,051-63 & nn. 1-136 (May 23, 1996) (hereinafter "The Compelling Interest"); *see Adarand VII*, 228 F.3d at 1167-1176, *citing The Compelling Interest.*

[131] *Pub* L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

[132] 49 CFR § 26.51.

USDOT considers and must approve the goal and the recipient's DBE program. The implementation of the Federal DBE Program is substantially in the hands of the state or local government recipient and is set forth in detail in the federal regulations, including 49 CFR § 26.45.

Provided in 49 CFR § 26.45 are instructions as to how recipients of federal funds should set the overall goals for their DBE programs. In summary, the recipient establishes a base figure for relative availability of DBEs.[133] This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient's market.[134] Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.[135] There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 CFR § 26.45(d). These include, among other types, the current capacity of DBEs to perform work on the recipient's contracts as measured by the volume of work DBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and training.[136] This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE participation one would expect absent the effects of discrimination.[137]

Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goal can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.[138]

A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.[139] A recipient of federal funds must establish a contract clause requiring prime contractors to promptly pay subcontractors in the Federal DBE Program (42 CFR § 26.29). The Federal DBE Program also established certain record-keeping requirements, including maintaining a bidders list containing data on contractors and subcontractors seeking federally-assisted contracts from the agency (42 CFR § 26.11). There are multiple administrative requirements that recipients must comply with in accordance with the regulations.[140]

---

[133] 49 CFR § 26.45(a), (b), (c).

[134] *Id.*

[135] *Id.* at § 26.45(d).

[136] *Id.*

[137] 49 CFR § 26.45(b)-(d).

[138] 49 CFR § 26.51.

[139] 49 CFR § 26.51(b).

[140] 49 CFR §§ 26.21-26.37.

Federal aid recipients are to certify DBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.

MAP-21 (July 2012).

In the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress provides "Findings" that "discrimination and related barriers" "merit the continuation of the" Federal DBE Program.[141] In MAP-21, Congress specifically finds as follows:

> "(A) while significant progress has occurred due to the establishment of the disadvantaged business enterprise program, discrimination and related barriers continue to pose significant obstacles for minority- and woman-owned businesses seeking to do business in federally-assisted surface transportation markets across the United States;
>
> (B) the continuing barriers described in subparagraph (A) merit the continuation of the disadvantaged business enterprise program;
>
> (C) Congress has received and reviewed testimony and documentation of race and gender discrimination from numerous sources, including congressional hearings and roundtables, scientific reports, reports issued by public and private agencies, news stories, reports of discrimination by organizations and individuals, and discrimination lawsuits, which show that race- and gender-neutral efforts alone are insufficient to address the problem;
>
> (D) the testimony and documentation described in subparagraph (C) demonstrate that discrimination across the United States poses a barrier to full and fair participation in surface transportation-related businesses of women business owners and minority business owners and has impacted firm development and many aspects of surface transportation-related business in the public and private markets; and
>
> (E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business."[142]

Thus, Congress in MAP-21 determined based on testimony and documentation of race and gender discrimination that there is "a compelling need for the continuation of the" Federal DBE Program.[143]

---

[141] Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

[142] Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

[143] *Id.*

USDOT Final Rule, 76 Fed. Reg. 5083 (January 28, 2011).

The United States Department of Transportation promulgated a new Final Rule on January 28, 2011, effective February 28, 2011, 76 Fed. Reg. 5083 (January 28, 2011) ("Final Rule") amending the Federal DBE Program at 49 CFR Part 26. According to the United States DOT, the Rule increased accountability for recipients with respect to meeting overall goals, modified and updated certification requirements, adjusted the personal net worth threshold for inflation to $1.32 million dollars, provided for expedited interstate certification, added provisions to foster small business participation, provided for additional post-award oversight and monitoring, and addressed other matters.[144]

In particular, the Final Rule provided that a recipient's DBE Program must include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently is actually performed by the DBEs to which the work was committed and that this mechanism must include a written certification that the recipient has reviewed contracting records and monitored work sites for this purpose.[145]

In addition, the Final Rule added a Section 26.39 to Subpart B to provide for fostering small business participation.[146] The recipient's DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, which must be submitted to the appropriate DOT operating administration for approval.[147] The new Final Rule provided a list of "strategies" that may be included as part of the small business program, including establishing a race-neutral small business set-aside for prime contracts under a stated amount; requiring bidders on prime contracts to specify elements or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform; requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform; and to meet the portion of the recipient's overall goal it projects to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform and other strategies.[148] The new Final Rule provided that actively implementing program elements to foster small business participation is a requirement of good faith implementation of the recipient's DBE program.[149]

The Final Rule also provided that recipients must take certain specific actions if the awards and commitments shown on its Uniform Report of Awards or Commitments and Payments, at the end of any fiscal year, are less than the overall goal applicable to that fiscal year, in order to be

---

[144] 76 F.R. 5083-5101.

[145] *See* 49 CFR § 26.37, 76 F.R. at 5097.

[146] 76 F.R. at 5097, January 28, 2011.

[147] *Id.*

[148] *Id.* at 5097, amending 49 CFR § 26.39(b)(1)-(5).

[149] *Id.* at 5097, amending 49 CFR § 26.39(c).

regarded by the DOT as implementing its DBE program in good faith.[150] The Final Rule set out what action the recipient must take in order to be regarded as implementing its DBE program in good faith, including analyzing the reasons for the difference between the overall goal and its awards and commitments, establishing specific steps and milestones to correct the problems identified, and submitting at the end of the fiscal year a timely analysis and corrective actions to the appropriate operating administration for approval, and additional actions.[151] The Final Rule provided a list of acts or omissions that DOT will regard the recipient as being in non-compliance for failing to implement its DBE program in good faith, including not submitting its analysis and corrective actions, disapproval of its analysis or corrective actions, or if it does not fully implement the corrective actions.[152]

The Department stated in the Final Rule with regard to disparity studies and in calculating goals, that it agrees "it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (*e.g.*, firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance."[153]

The United States DOT in the Final Rule stated that there is a continuing compelling need for the DBE program.[154] The DOT concluded that, as court decisions have noted, the DOT's DBE regulations and the statutes authorizing them, "are supported by a compelling need to address discrimination and its effects."[155] The DOT said that the "basis for the program has been established by Congress and applies on a nationwide basis...", noted that both the House and Senate Federal Aviation Administration ("FAA") Reauthorization Bills contained findings reaffirming the compelling need for the program, and referenced additional information presented to the House of Representatives in a March 26, 2009 hearing before the Transportation and Infrastructure Committee, and a Department of Justice document entitled "The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and Woman-owned Businesses."[156] This information, the DOT stated, "confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program."[157]

US DOT Final Rule, 79 Fed. Reg. 59566 (October 2, 2014)
DBE: Program Implementation Modifications for 49 CFR Part 26 (Effective Nov. 3, 2014).[158]

---

[150] 76 F.R. at 5098, amending 49 CFR § 26.47(c).

[151] *Id.*, amending 49 CFR § 26.47(c)(1)-(5).

[152] *Id.*, amending 49 CFR § 26.47(c)(5).

[153] 76 F.R. at 5092.

[154] 76 F.R. at 5095.

[155] 76 F.R. at 5095.

[156] *Id.*

[157] *Id.*

[158] 79 F.R. 59566-59622 (October 2, 2014).

On September 6, 2012, the Department of Transportation published a Notice of Proposed Rulemaking (NPRM) entitled, "Disadvantaged Business Enterprise: Program Implementation Modifications" in the Federal Register.

The USDOT noted the DBE Program was recently reauthorized in the Moving Ahead for Progress in the 21st Century Act ("MAP-21"), Public Law 112-141 (enacted July 6, 2012), and that the Department believes this reauthorization is intended to maintain the status quo of the DBE Program.[159]

The Final Rule issued on October 2, 2014, and effective on November 3, 2014, amending the Federal DBE Program at 49 C.F.R. Part 26, provides substantial changes and additions to the implementation and administration of the Federal DBE Program regulations in three primary areas:

(1) The Rule revises the Uniform Certification Application and reporting forms, establishes a uniform personal net worth form as part of the Uniform Certification Application, and provides for data collection required by the U.S. DOT statutory reauthorization, MAP-21;

(2) The Rule revises the certification-related program provisions and standards; and

(3) The Rule amends and modifies several program provisions, including: overall goal setting by recipients of federal funds, good faith efforts, guidance and submissions, transit vehicle manufacturers, counting for trucking companies, and program administration.[160]

The new and revised forms include the U.S. DOT personal net worth form, a revised uniform application form and checklist, and a revised uniform report of awards or commitments, and payments. The new provisions include reporting requirements under MAP-21, adding a new provision authorizing summary suspensions of DBEs under certain circumstances, and new record retention requirements.[161]

Several of the areas revised include:

- the size standard on statutory gross receipts has been increased for inflation;
- the ownership and control provisions have been amended, including a new rule examining whether there are any agreements or practices that give a non-disadvantage individual or firm a priority or superior right to a DBE's profits, and setting forth an assumption of control when a non-disadvantaged individual who is a former owner of the firm remains involved in the operation of the firm;
- certification procedures and grounds for decertification are revised including the areas of prequalification, grounds for removal, summary suspension, and certification appeals;

---

[159] 77 F.R. at 54952.

[160] 79 F.R. 59566-59622.

[161] *Id.*

- the overall goal setting obligations, including methodology and process, data sources to determine the relative availability of DBEs, and any step two adjustments by the recipient of federal funds to the base figure supported by evidence;
- the submission of good faith efforts as a matter of "responsiveness" or as a matter of "responsibility", including reduction in number of days as to when the information of good faith efforts must be submitted either at the time of bid or after bid opening;
- guidance on good faith efforts, including examples of the kinds of actions that recipients may consider when evaluating good faith efforts by bidders and offerors;
- provisions relating to the replacing of DBEs; and
- counting of DBE participation, including trucking services and expenditures with DBEs for materials and supplies and related matters.[162]

In terms of forms and data collection, the new Rule attempts to simplify the Uniform Certification Application; establishes a new U.S. DOT personal net worth form to be used by applicants; establishes a uniform report of DBE awards or commitments and payments; captures data on minority woman-owned DBEs and actual payments to DBEs reporting; and provides for a new submission required by MAP-21 on the percentage of DBEs in the state owned by non-minority women, and men.[163]

The new Rule makes certain changes in connection with program administration, including: adding to the definitions of "immediate family members" and "spouse" domestic partnerships and civil unions; the retention of all records documenting a DBE's compliance with the eligibility requirements, including the complete application package and subsequent reports; and adding to the provisions relating to the contract clause included in each DOT-assisted contract that obligates the contractor to comply with the DBE Program regulations in the administration of the contract, and specifying that failure to do so may result in termination of the contract or other remedies.[164]

The Rule also provides changes to the definitions in the federal regulations, including for the following terms: assets, business, business concern, business enterprise, contingent liability, liabilities, primary industry classification, principal place of business, and social and economically disadvantaged individual.[165]

4. Pending Cases (at the time of this report).

There are pending cases in the federal courts, at the time of this report, that may potentially impact and be instructive to Indiana, including the following:

---

[162] *Id.*

[163] *Id.*

[164] 79 F.R. 59566-59622.

[165] *Id.*

Pending Cases on Appeal (at the time of this report):

Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al. 2014 WL 6686734 (D. Mont. Nov. 26, 2014) *appeal pending* in the U.S. Court of Appeals, Ninth Circuit, Docket Numbers 14-36097 and 15-35003.

Midwest Fence Corporation v. United States Department of Transportation and Federal Highway Administration, the Illinois Department of Transportation, the Illinois State Toll Highway Authority, et al. 2015 WL 1396376 (N.D. Ill, March 24, 2015), appeal pending in the U.S. Court of Appeals, Seventh Circuit, Docket Number 15-1827.

Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. Feb 12, 2014), *appeal pending* in the U.S. Court of Appeals, Seventh Circuit, Docket Number 14-1493.

This list of pending cases is not exhaustive, but is illustrative of current pending cases that may impact MBE/WBE and DBE Programs.

Ongoing review. The above represents a summary of the legal framework pertinent to implementation of DBE, MBE/WBE, or race-, ethnicity-, or gender-neutral programs. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

D. Recent Decisions Involving State or Local Government MBE/WBE DBE Programs and the Federal DBE Program in the Seventh Circuit Court of Appeals

1. *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 (7th Cir. 2007)

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation's ("IDOT") DBE Program. Plaintiff Northern Contracting Inc. ("NCI") was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7th Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id.* at 719. The district court granted the USDOT's Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id.* at 720. NCI also forfeited the argument that IDOT's DBE program did not serve a compelling government interest. *Id.* The sole issue on appeal to the Seventh Circuit was whether IDOT's program was narrowly tailored. *Id.*

IDOT typically adopted a new DBE plan each year. *Id.* at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id.* The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id.* The consultant then determined availability of minority- and woman-owned firms through analysis of Dun & Bradstreet's Marketplace data. *Id.* This initial list was corrected for errors in the data by surveying the D&B list. *Id.* In light of these surveys, the

consultant arrived at a DBE availability of 22.77 percent. *Id.* The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id.* IDOT considered this, along with other data, including DBE utilization on IDOTs "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id.* at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id.*

Despite the fact the NCI forfeited the argument that IDOT's DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. *Id.* at 720. The court noted that, post-*Adarand*, two other circuits have held that a state may rely on the federal government's compelling interest in implementing a local DBE plan. *Id.* at 720-21, *citing Western States Paving Co., Inc. v. Washington State DOT*, 407 F.3d 983, 987 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that "[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government .... If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution." *Id.* at 721, quoting *Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7th Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. *Id.* The court concluded it's holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Pena*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id.* The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id.* at 722, n. 5. Relatedly, the court stated that the Eighth Circuit's opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law "when the 10 percent federal set-aside was more mandatory") was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id.* at 722. Federal law makes more clear now that the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id.* at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI's collateral attack on the federal regulations was impermissible. *Id.* at 722.

The remainder of the court's opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI's arguments failed. *Id.* First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id.* NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id.* The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id.* at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled "Alternative Methods," and states: "You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market." *Id.* (*citing* 49 C.F.R. § 26.45(c)(5)). According to the court, the regulations make clear that "relative availability" means "the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate" on DOT contracts. *Id.* The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalified DBEs. *Id.* The court agreed with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. *Id.*

Second, NCI argued that the IDOT failed to properly adjust its goal based on local market conditions. *Id.* The court noted that the federal regulations do not require any adjustments to the base figure, but simply provide recipients with authority to make such adjustments if necessary. *Id.* According to the court, NCI failed to identify any aspect of the regulations requiring IDOT to separate prime contractor availability from subcontractor availability, and pointed out that the regulations require the local goal to be focused on overall DBE participation. *Id.*

Third, NCI contended that IDOT violated the federal regulations by failing to meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. *Id.* at 723-24. NCI argued that IDOT should have considered DBEs who had won subcontracts on goal projects where the prime contractor did not consider DBE status, instead of only considering DBEs who won contracts on no-goal projects. *Id.* at 724. The court held that while the regulations indicate that where DBEs win subcontracts on goal projects strictly through low bid this can be counted as race-neutral participation, the regulations did not require IDOT to search for this data, for the purpose of calculating past levels of race-neutral DBE participation. *Id.* According to the court, the record indicated that IDOT used nearly all the methods described in the regulations to maximize the portion of the goal that will be achieved through race-neutral means. *Id.*

The court affirmed the decision of the district court upholding the validity of the IDOT DBE program and found that it was narrowly tailored to further a compelling governmental interest. *Id.*

2. *Northern* Contracting, *Inc. v. Illinois,* 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), aff'd 473 F.3d 715 (7th Cir. 2007)

This decision is the district court's order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of

the Federal DBE Program and local and state governments' implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties' Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra*. The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the "plaintiff"), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations ("TEA-21"), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at *1 (N.D. Ill. Sept, 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the "maximum feasible portion" of its DBE goal through race-neutral means. *Id.* at *4 (citing regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. *Id.* (citing regulation). [The court provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

Statistical evidence. To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id.* at *6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id.*

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id.* at *6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id.* at *7. The study thus calculated a weighted average base figure of 22.7 percent. *Id.*

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. *Id.* at *8. One study examined disparities in earnings and business formation

rates as between DBEs and their white male-owned counterparts. *Id.* Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. *Id.*

IDOT considered three reports prepared by expert witnesses. *Id.* at *9. The first report concluded that minority- and woman-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id.* The second report concluded, after controlling for relevant variables such as credit worthiness, "that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males." *Id.* The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses' formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. *Id.*

IDOT also conducted a series of public hearings in which a number of DBE owners who testified that they "were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm hiring goals." *Id.* Additionally, witnesses identified 20 prime contractors in IDOT District 1 alone who rarely or never solicited bids from DBEs on non-goals projects. *Id.* The prime contractors did not respond to IDOT's requests for information concerning their utilization of DBEs. *Id.*

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County's public construction contracts, and a "non-goals" experiment conducted by IDOT between 2001 and 2002), and considered past utilization of DBEs on IDOT projects. *Id.* at *11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent. However, IDOT decided to maintain its figure at 22.77 percent. *Id.*

IDOT's representative testified that the DBE program was administered on a "contract-by-contract basis." *Id.* She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the "lowest responsible bidder." IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (*e.g.*, where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). *Id.* at *12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id.*

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court's earlier summary judgment order, including:

1. A "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;
2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint

small firms with larger contractors and to encourage the involvement of small firms in major construction projects);

3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;
4. "Unbundling" large contracts; and
5. Allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses.

Id. (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit, and establishing a mentor-protégé program. *Id.*

The court found that IDOT attempted to achieve the "maximum feasible portion" of its overall DBE goal through race- and gender-neutral measures. *Id.* at *13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43 percent of its DBE goal, leaving 16.34 percent to be reached using race- and gender-conscious measures. *Id.*

Anecdotal evidence. A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id.* The DBE owners also testified to difficulties in obtaining work in the private sector and "unanimously reported that they were rarely invited to bid on such contracts." *Id.* The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id.* A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id.* at *13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who "frequently are forced to pay higher insurance rates due to racial and gender discrimination." *Id.* at *14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id.*

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id.* Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they "occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT." *Id.* A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id.* at *15.

Strict scrutiny. The court applied strict scrutiny to the program as a whole (including the gender-based preferences). *Id.* at *16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a "'strong basis in evidence' to conclude that remedial action was necessary, before it embarks on an affirmative action program ... If the government makes such a showing, the party challenging the affirmative action plan bears the 'ultimate burden' of demonstrating the unconstitutionality of the program." *Id.* The court held that challenging party's burden "can only be met by presenting credible evidence to rebut the government's proffered data." *Id.* at *17.

To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show "that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction." *Id.* at *16.

The court found that IDOT presented "an abundance" of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id.* at *17. The plaintiff argued that the study was "erroneous because it failed to limit its DBE availability figures to those firms ... registered and pre-qualified with IDOT." *Id.* The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id.* Accordingly, the plaintiff alleged that IDOT's calculation of DBE availability and utilization rates was incorrect. *Id.*

The court found that other jurisdictions had utilized the custom census approach without successful challenge. *Id.* at *18. Additionally, the court found "that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability." *Id.* at *19. The court found that IDOT presented "an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets." *Id.* at *21. The court also found that the statistical studies were consistent with the anecdotal evidence. *Id.* The court did find, however, that "there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This ... is [also] supported by the statistical data ... which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability." *Id.* at *21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding. However, the court found that such verification was unnecessary. *Id.* at *21, n. 32.

The court further found:

> That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: '[E]xperience and size are not race- and gender-neutral variables ... [DBE] construction firms are generally smaller and less experienced *because* of industry discrimination.'

Id. at *21, *citing Concrete Works of Colorado, Inc. v. City and County of Denver,* 321 F.3d 950 (10th Cir. 2003).

The parties stipulated to the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. *Id.* at *22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. *Id.* The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT's fiscal year 2005 goal was a "'plausible lower-bound estimate' of DBE participation in the absence of discrimination." *Id.* The court found that the plaintiff did not present persuasive evidence to contradict or explain IDOT's data. *Id.*

The plaintiff argued that even if accepted at face value, IDOT's marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. *Id.* The court found first that IDOT's indirect evidence of discrimination in the bonding, financing, and insurance markets was sufficient to establish a compelling purpose. *Id.* Second, the court found:

[M]ore importantly, plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally-funded highway contracts. This is a fundamental distinction ... [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

Id. at *23. The court distinguished *Builders Ass'n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff'd* 256 F.3d 642 (7th Cir. 2001), noting that the program in that case was not federally-funded. *Id.* at *23, n. 34.

The court also found that "IDOT has done its best to maximize the portion of its DBE goal" through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id.* at *24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. *Id.* The small business initiative included: "unbundling" large contracts; allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses; a "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id.*

The court found "[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures." *Id.* at *25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id.* The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id., citing Adarand Constructors, Inc. v. Slater "Adarand VII"*, 228 F.3d 1147, 1177 (10th Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT's DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

3. *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004)

This is the earlier decision in *Northern Contracting, Inc.*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), *see* above, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 C.F.R. Part 26) as well as the implementation of the Federal Program by the IDOT (*i.e.*, the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT's DBE Program is narrowly tailored to achieve the federal government's compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT's implementation of the Federal DBE Program.

The court in *Northern Contracting*, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the court granted the complaint defendants' Motion for Summary Judgment challenging the validity of the Federal DBE Program. In this connection, the district court followed the decisions and analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*"), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally-assisted highway subcontracting. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at *34, *citing Adarand VII*, 228 F.3d at 1175.

In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on IDOT's implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 C.F.R. § 26.45(b). The court recognized, as found in the *Sherbrooke Turf* and *Adarand VII* cases, that the federal regulations place strong emphasis on the use of race-

neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require "serious, good faith consideration of workable race-neutral alternatives." 2004 WL422704 at *36, *citing* and quoting *Sherbrooke Turf*, 345 F.3d at 972, quoting *Grutter v. Bollinger*, 539 U.S. 306 (2003). The court held that the complaint regulations, which prohibit the use of quotas and severely limit the use of set-asides, meet this requirement. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the Federal DBE Program does require recipients to make a serious good faith consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the court found that because the Federal DBE Program is subject to periodic reauthorization, and requires recipients of complaint dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual's personal net worth exceeds $750,000.00, and a firm owned by individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 C.F.R. § 26.67(b)(1)(d). The court found other aspects of the federal regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 C.F.R. § 26.51(e)(f). Recipients also administering a DBE Program in good faith cannot be penalized for failing to meet their DBE goals, and a recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 C.F.R. § 26.51(f). Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 C.F.R. § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 C.F.R. § 26.43.

Fourth, the court agreed with the *Sherbrooke Turf* court's assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.

Fifth, the court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every women and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipts over three fiscal years of $16.6 million or less (at the time of this decision), and

businesses whose owners' personal net worth exceed $750,000.00 are excluded. 49 C.F.R. § 26.67(b)(1). In addition, a firm owned by a white male may qualify as socially and economically disadvantaged. 49 C.F.R. § 26.67(d).

The court analyzed the constitutionality of the IDOT DBE Program. The court adopted the reasoning of the Eighth Circuit in *Sherbrooke Turf*, that a recipient's implementation of the Federal DBE Program must be analyzed under the narrow tailoring analysis but not the compelling interest inquiry. Therefore, the court agreed with *Sherbrooke Turf* that a recipient need not establish a distinct compelling interest before implementing the Federal DBE Program, but did conclude that a recipient's implementation of the Federal DBE Program must be narrowly tailored. The court found that issues of fact remain in terms of the validity of the IDOT's DBE Program as implemented in terms of whether it was narrowly tailored to achieve the Federal Government's compelling interest. The court, therefore, denied the contractor plaintiff's Motion for Summary Judgment and the Illinois DOT's Motion for Summary Judgment.

4. *Midwest Fence Corporation v. United States Department of Transportation and Federal Highway Administration, the Illinois Department of Transportation, the Illinois State Toll Highway Authority, et al.*, 2015 WL 1396376 (N.D. Ill, March 24, 2015), *appeal pending* in the U.S. Court of Appeals, Seventh Circuit, Docket Number 15-1827.

In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise ("DBE") Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation's ("IDOT") implementation of the Federal DBE Program for federally-funded projects, IDOT's implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority's ("Tollway") separate DBE Program.

The federal district court in 2011 issued an Opinion and Order denying the Defendants' Motion to Dismiss for lack of standing, denying the Federal Defendants' Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants' Motion to Dismiss certain Counts and granting the Tollway Defendants' Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*, 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied, and challenged the IDOT's implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT's DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway's DBE Program is unconstitutional, and a request for punitive damages against the Tollway Defendants. The

court in 2012 granted the Tollway Defendants' Motion to Dismiss Midwest Fence's request for punitive damages.

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 2015 WL 1396376 at *7. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court decision in *Croson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality's prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing "hard proof" to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at *7. While narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," the court said it does not require "exhaustion of every conceivable race-neutral alternative." *Id., citing Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 2015 WL 1396376 at *7. To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own. *Id.*

This can be accomplished, according to the court, by providing a neutral explanation for the disparity between DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data. *Id.* Conjecture and unsupported criticisms of the government's methodology are insufficient. *Id.*

Standing. The court found that Midwest had standing to challenge the Federal DBE Program, IDOT's implementation of it, and the Tollway Program. *Id.* at *8. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at *9.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would have hindered its ability to compete for fencing and guardrails work. *Id.* at *9. Midwest did not allege that it would have bid on contracts set aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market Program impeded Midwest's ability to compete for work in these

Districts, the court dismissed Midwest's claim relating to the Target Market Program for lack of standing.

Facial challenge to the Federal DBE Program. The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at *11. The Federal Defendants, the court said, presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id.* The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program's 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id.*

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority-and woman-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id.* at *11. Sixty-four of the studies had previously been presented to Congress. *Id.* The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id.* The consultant's report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all "likely to be influenced by the presence of discrimination if it exists" and could potentially result in a built-in downward bias in the availability measure. *Id.* at *11.

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a "disparity index" for each study. *Id. at *11.* The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep't. of Def.*, 545 F. 3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government's compelling interest in implementing a national program. *Id.* at *12, *citing Rothe*, 545 F. 3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a "strong basis in evidence" to support the conclusion that race-and gender-conscious action is necessary. *Id.* at *12.

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id. at *12.* The Midwest expert's suggestion that the studies used in consultant's report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court *quoting Adarand VII*, 228 F.3d at 1173 N.H. (10th Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular

disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id.* Midwest failed to present "affirmative evidence" that no remedial action was necessary. *Id.*

Federal DBE Program is narrowly tailored. Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id.* at *12. In determining whether a program is narrowly tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that courts may also assess whether a program is "overinclusive." *Id.* The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at *13. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program's duration and ensure its flexibility. *Id.* at *13. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at *13. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a "good faith efforts waiver" on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id. at* *13. The court rejected Midwest's argument that the federal regulations impose a quota in light of the Program's explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at *13. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE Program's goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program's burden on non-DBEs. *Id.* at *13. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program's presumption of social

and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become "overconcentrated" in a particular area of contract work, recipients must take appropriate measures to address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.* at *13.

The court said Midwest's primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE subcontractors. *Id.* at *14. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program's approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at *14. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants' evidence. *Id* at *14. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at *14. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

As-applied challenge to IDOT's implementation of the Federal DBE Program. In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id.* The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT's implementation of the Federal DBE Program. *Id.* Following the Seventh Circuit's decision in *Northern Contracting v. Illinois DOT,* the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at *14, *citing Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7th Cir. 2007). The court, *quoting Northern Contracting,* held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at *14.

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id.* at *14. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id.* at *14. Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2)

demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

IDOT's evidence of discrimination and DBE availability in Illinois. The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id.* at *15. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. *Id.* at *15. The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id.* at *15.

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at *15. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under $500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at *15. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at *15. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and woman-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the

regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.* According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id.* at *16. The study and the Goal–Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.*

Court rejected Midwest arguments as to the data and evidence. The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at *16. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id.* at *16. The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at *16. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest's main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id.* at *16. Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.* at *16.

IDOT argued that on prime contracts under $500,000, capacity is a variable that makes little difference. *Id.* at *17. Prime contracts of varying sizes under $500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at *17. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest's argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs, the Supreme Court has indicated that a regression analysis need not take into account "all measurable variables" to rule out race-neutral explanations for observed disparities. *Id.* at *17 *quoting Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

Midwest criticisms insufficient, speculative and conjecture – no independent statistical analysis; IDOT followed *Northern Contracting* and did not exceed the federal regulations. The court found Midwest's criticisms insufficient to rebut IDOT's evidence of discrimination or discredit IDOT's methods of calculating DBE availability. *Id.* at *17. First, the court said, the "evidence" offered by Midwest's expert reports "is speculative at best." *Id.* at *17. The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with "credible, particularized evidence" of its own, such as a neutral explanation for the

disparity, or contrasting statistical data. *Id.* at *17. The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT's method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at *17. The federal regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the use of DBE directories, Census Bureau data, and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the "custom census" approach as consistent with the federal regulations. *Id.* at *17, *citing* to *Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at *17.

The court held that through the 2004 and 2011 studies, and Goal–Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at *18. The court said that in response to the Seventh Circuit decision and IDOT's evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies' result. *Id.*

The court pointed out that although Midwest's expert's reports "cast doubt on the validity of IDOT's methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias." *Id.* at *18. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT's availability calculations.

Burden on non–DBE subcontractors; overconcentration. The court addressed the narrow tailoring factor concerning whether a program's burden on third parties is undue or unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at *18. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence relating to overconcentration. *Id.* The court found that Midwest did not show IDOT's determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at *18.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at *19. The court noted that it recognizes setting goals as a percentage of total

contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id* at *19. The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

Use of race–neutral alternatives. The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor–Protégé, and Model Contractor Programs. *Id.* at *19. The programs provide workshops and training that help small businesses build bonding capacity, gain access to financial and project management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at *19. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

Duration and flexibility. The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at *19. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over $36 million in contracting dollars. *Id.* at *19. The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id.*

The court held the undisputed facts established that IDOT did not have a "no-waiver policy." *Id.* at *20. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* Because Midwest's own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at *20.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT's implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at *20. Accordingly, the court granted IDOT's motion for summary judgment.

Facial and as-applied challenges to the Tollway program. The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at *20. Like the Federal and IDOT Defendants, the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a

2006 disparity study, which examined the disparity between the Tollway's utilization of DBEs and their availability. *Id.*

The study employed a "custom census" approach to calculate DBE availability, and examined the Tollway's contract data to determine utilization. *Id.* at *20. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an "economy-wide analysis" examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* at *21. Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person's race or sex and their earning power and ability to form a business. *Id.*

Midwest's challenges to the Tollway evidence insufficient and speculative. In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was an "economy-wide analysis" similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at *21. The updated census analysis, according to the court, controlled for variables such as education, age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.*

Midwest attacked the Tollway's 2006 study similar to how it attacked the other studies with regard to IDOT's DBE Program. *Id.* at *21. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* at *21. The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the "economy-wide analysis" revealed a negative correlation between an individual's race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at *21.

To successfully rebut the Tollway's evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway's statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at *22. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at *22. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

Tollway Program is narrowly tailored. As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at *22.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway's method of goal setting is identical to that prescribed by the federal regulations, which the court already found to be supported by strong policy reasons. *Id.* at *22. The court stated that the sharing of a

remedial program's burden is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at *22. The court held the Tollway Program's burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at *22. The court held the Tollway's race-neutral measures are consistent with those suggested under the federal regulations and found that the availability of these programs, which mirror IDOT's, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at *22.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at *23. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.* at *23.

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at *23. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment.

Notice of Appeal. At the time of this report, Midwest Fence Corporation has filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, which appeal is pending.

5. *Dunnet Bay Construction Company v. Gary Hannig*, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. Feb 12, 2014), *appeal pending* in U.S. Court of Appeals for the Seventh Circuit, Docket No. 14-1493.

In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an alleged unwritten "no waiver" policy, and claiming that the IDOT's program is not narrowly tailored.

Motion to Dismiss certain claims granted. IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT's DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

Motions for Summary Judgment. Subsequent to the Court's Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT's implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at * 1. IDOT also filed a Motion for Summary Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT's DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project , was based upon Dunnet Bay's race. IDOT also asserted that, because Dunnet Bay was relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

Factual Background. Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at *3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at *4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of

the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at *4.

At the bid opening, Dunnet Bay's bid was the lowest received by IDOT. Its low bid was over IDOT's estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay's DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay's good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay's bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id.* at *9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id.* at *23. IDOT further asserted that neither rejection of Dunnet Bay's bid nor the decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id.* at *23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority. The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government's compelling interest in remedying the effects of pass discrimination in the national construction market." *Id.* at *26, quoting *Northern Contracting Co., Inc. v. Illinois,* 473 F.3d 715 at 720-21 (7th Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority. " *Id.* at *26, quoting *Northern Contracting, Inc.*, 473 F.3d at 721. The Court held that accordingly, any "challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. " *Id.* at *26, quoting *Northern Contracting, Inc.,* 473. F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay's challenges are foreclosed by *Northern Contracting*. *Id.* at *26.

The Court found that IDOT did in fact employ a thorough process before arriving at the 22 percent DBE participation goal for the Eisenhower Project. *Id.* at *26. The Court also concluded

"because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any challenge on this factor fails under *Northern Contracting*." *Id.* at *26. Therefore, the Court concluded there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor. *Id.* at *27.

The "no-waiver" policy. The Court held that there was not a no-waiver policy considering all the testimony and factual evidence. In particular, the Court pointed out that a waiver was in fact granted in connection with the same bid letting at issue in this case. *Id* at *27. The Court found that IDOT granted a waiver of the DBE participation goal for another construction contractor on a different contract, but under the same bid letting involved in this matter. *Id.*

Thus, the Court held that Dunnet Bay's assertion that IDOT adopted a "no-waiver" policy was unsupported and contrary to the record evidence. *Id.* at *27. The Court found the undisputed facts established that IDOT did not have a "no-waiver" policy, and that IDOT did not exceed its federal authority because it did not adopt a "no-waiver" policy. *Id.* Therefore, the Court again concluded that any challenge by Dunnet Bay on this factor failed pursuant to the *Northern Contracting* decision.

IDOT's decision to reject Dunnet Bay's bid based on lack of good faith efforts did not exceed IDOT's authority under federal law. The Court found that IDOT has significant discretion under federal regulations and is often called upon to make a "judgment call" regarding the efforts of the bidder in terms of establishing good faith attempt to meet the DBE goals. *Id.* at *28. The Court stated it was unable to conclude that IDOT erred in determining Dunnet Bay did not make adequate good faith efforts. *Id.* The Court surmised that the strongest evidence that Dunnet Bay did not take all necessary and reasonable steps to achieve the DBE goal is that its DBE participation was under 9 percent while other bidders were able to reach the 22 percent goal. *Id.* Accordingly, the Court concluded that IDOT's decision rejecting Dunnet Bay's bid was consistent with the regulations and did not exceed IDOT's authority under the federal regulations. *Id.*

The Court also rejected Dunnet Bay's argument that IDOT failed to provide Dunnet Bay with a written explanation as to why its good faith efforts were not sufficient, and thus there were deficiencies with the reconsideration of Dunnet Bay's bid and efforts as required by the federal regulations. *Id.* at *29. The Court found it was unable to conclude that a technical violation such as to provide Dunnet Bay with a written explanation will provide any relief to Dunnet Bay. *Id.* Additionally, the Court found that because IDOT rebid the project, Dunnet Bay was not prejudiced by any deficiencies with the reconsideration. *Id.*

The Court emphasized that because of the decision to rebid the project, IDOT was not even required to hold a reconsideration hearing. *Id.* at *24. Because the decision on reconsideration as to good faith efforts did not exceed IDOT's authority under federal law, the Court held Dunnet Bay's claim failed under the *Northern Contracting* decision. *Id.*

Dunnet Bay lacked standing to raise an equal protection claim. The Court found that Dunnet Bay was not disadvantaged in its ability to compete against a racially favored business, and neither IDOT's rejection of Dunnet Bay's bid nor the decision to rebid was based on the race of Dunnet Bay's owners or any class-based animus. *Id* at *29. The Court stated that Dunnet Bay did

not point to any other business that was given a competitive advantage because of the DBE goals. *Id.* Dunnet Bay did not cite any cases which involve plaintiffs that are similarly situated to it - businesses that are not at a competitive disadvantage against minority-owned companies or DBEs - and have been determined to have standing. *Id.* at *30.

The Court concluded that any company similarly situated to Dunnet Bay had to meet the same DBE goal under the contract. *Id.* Dunnet Bay, the Court held, was not at a competitive disadvantage and/or unable to compete equally with those given preferential treatment. *Id.*

Dunnet Bay did not point to another contractor that did not have to meet the same requirements it did. The Court thus concluded that Dunnet Bay lacked standing to raise an equal protection challenge because it had not suffered a particularized injury that was caused by IDOT. *Id.* at *30. Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.* Also, based on the amount of its profits, Dunnet Bay did not qualify as a small business, and therefore, it lacked standing to vindicate the rights of a hypothetical white-owned small business. *Id.* at *30. Because the Court found that Dunnet Bay was not denied the ability to compete on an equal footing in bidding on the contract, Dunnet Bay lacked standing to challenge the DBE Program based on the Equal Protection Clause. *Id.* at *30.

Dunnet Bay did not establish equal protection violation even if it had standing. The Court held that even if Dunnet Bay had standing to bring an equal protection claim, IDOT still is entitled to summary judgment. The Court stated the Supreme Court has held that the "injury in fact" in an equal protection case challenging a DBE Program is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Id.* at *31. Dunnet Bay, the Court said, implied that but for the alleged "no-waiver" policy and DBE goals which were not narrowly tailored to address discrimination, it would have been awarded the contract. The Court again noted the record established that IDOT did not have a "no-waiver" policy. *Id.* at *31.

The Court also found that because the gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons, it does not appear Dunnet Bay can assert a viable claim. *Id.* at *31. The Court stated it is unaware of any authority which suggests that Dunnet Bay can establish an equal protection violation even if it could show that IDOT failed to comply with the regulations relating to the DBE Program. *Id.* The Court said that even if IDOT did employ a "no-waiver policy," such a policy would not constitute an equal protection violation because the federal regulations do not confer specific entitlements upon any individuals. *Id.* at *31.

In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. *Id.* at *51. Based on the record, the Court stated it could only speculate whether Dunnet Bay or another entity would have been awarded a contract without IDOT's DBE Program. But, the Court found it need not speculate as to whether Dunnet Bay or another company would have been awarded the contract, because what is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. *Id.* at *31. Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts. *Id.* Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. *Id.* Therefore, IDOT, the Court held, is

entitled to summary judgment on Dunnet Bay's claims under the Equal Protection Clause and under Title VI.

Conclusion. The Court concluded IDOT is entitled to summary judgment, holding Dunnet Bay lacked standing to raise an equal protection challenge based on race, and that even if Dunnet Bay had standing, Dunnet Bay was unable to show that it would have been awarded the contract in the absence of any violation. *Id.* at *32. Any other federal claims, the Court held, were foreclosed by the *Northern Contracting* decision because there is no evidence IDOT exceeded its authority under federal law. *Id.* Finally, the Court found Dunnet Bay had not established the likelihood of future harm, and thus was not entitled to injunctive relief.

Notice of Appeal. At the time of this report, Dunnet Bay Construction Company has filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, which appeal is pending.

6. *Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc.*, 460 F.3d 859 (7th Cir. 2006)

In *Rapid Test Products, Inc. v. Durham School Services Inc.*, the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1981 (the federal anti-discrimination law) did not provide an "entitlement" in disadvantaged businesses to receive contracts subject to set aside programs; rather, § 1981 provided a remedy for individuals who were subject to discrimination.

Durham School Services, Inc. ("Durham"), a prime contractor, submitted a bid for and won a contract with an Illinois school district. The contract was subject to a set-aside program reserving some of the subcontracts for disadvantaged business enterprises (a race- and gender-conscious program). Prior to bidding, Durham negotiated with Rapid Test Products, Inc. ("Rapid Test"), made one payment to Rapid Test as an advance, and included Rapid Test in its final bid. Rapid Test believed it had received the subcontract. However, after the school district awarded the contract to Durham, Durham gave the subcontract to one of Rapid Test's competitor's, a business owned by an Asian male. The school district agreed to the substitution. Rapid Test brought suit against Durham under 42 U.S.C. § 1981 alleging that Durham discriminated against it because Rapid's owner was a black woman.

The district court granted summary judgment in favor of Durham holding the parties' dealing had been too indefinite to create a contract. On appeal, the Seventh Circuit Court of Appeals stated that "§ 1981 establishes a rule against discrimination in contracting and does not create any entitlement to be the beneficiary of a contract reserved for firms owned by specified racial, sexual, ethnic, or religious groups. Arguments that a particular set-aside program is a lawful remedy for prior discrimination may or may not prevail if a potential subcontractor claims to have been excluded, but it is to victims of discrimination rather than frustrated beneficiaries that § 1981 assigns the right to litigate."

The court held that if race or sex discrimination is the reason why Durham did not award the subcontract to Rapid Test, then § 1981 provides relief. Having failed to address this issue, the Seventh Circuit Court of Appeals remanded the case to the district court to determine whether Rapid Test had evidence to back up its claim that race and sex discrimination, rather than a nondiscriminatory reason such as inability to perform the services Durham wanted, accounted for Durham's decision to hire Rapid Test's competitor.

7. *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001)

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contacts discriminated against any of the groups "favored" by the Program. The court also found that the Program was not "narrowly tailored" to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* ("*VMI*"), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become "vanishingly small." *Id.* The court pointed out that the Supreme Court said in the *VMI* case, that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive' justification for that action ..." and, realistically, the law can ask no more of race-based remedies either." 256 F.3d at 644, quoting in part *VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1997) decision created the "paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes." 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women's "set aside programs," the women's program the court determined must clear the same "hurdles" as the minority program." 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is "to be expected that there would be more soliciting of these contractors on public than on private projects." *Id.* Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County "conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance." 256 F.3d at 645 quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a "public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy." 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry "tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County." 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id.* The court noted that "[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit ... to be entitled to take remedial action." *Id.* But, the court found "of that there is no evidence either." *Id.*

The court stated that if the County had been complicit in discrimination by prime contractors, it found "puzzling" to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would "flunk the constitutional test" by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id.* Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id.* "Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority persons." *Id.* The court, therefore, held that the ordinance was not "narrowly tailored" to the wrong that it seeks to correct. *Id.*

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of "favored minorities" included groups that have never been subject to significant discrimination by Cook County. *Id.* The court found it unreasonable to "presume" discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id.* Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case—"that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project." 256 F.3d at 647-648.

8. *Milwaukee County Pavers, Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991).

State and federal programs challenged. In this case an association of highway contractors in Wisconsin brought suit to enjoin programs by which the State of Wisconsin "sets aside" certain highway contracts for firms that are certified as disadvantaged business enterprises (DBEs), and also requires highway contractors to give preferential treatment to subcontractors that are

certified as DBE's. 922 F.2d at 421. In the first type of program challenged by the highway contractors, according to the Court, the State of Wisconsin is the principal, rather than an agent of federal highway authorities, because the state receives no money from the federal government. *Id.* The state program involving non-federal funds was enjoined by the district court. *Id.*

In a second type of program challenged by the highway contractors, the Court finds the State of Wisconsin is the administrator and disbursing agent of federal highway grants. *Id.* at 421. This federal program the district court refused to enjoin. *Id.*

State Program. The Court states that the majority of the Justices of the Supreme Court believe that racial discrimination in any form, including reverse discrimination, is unconstitutional when done by states or municipalities, unless the purpose is to provide a remedy for discrimination against the favored group. *Id.* at 421-422. The Court found that Wisconsin made no effort to show that its program was remedial in any sense. The Court rejected Wisconsin's argument that *City of Richmond v. J.A. Croson,* 488 U.S. 469 (1989), does not apply because its program involved DBEs and not MBEs.

The Court affirmed the injunction against the State of Wisconsin Program because the state did not establish that the purpose was to remedy discrimination.

Role of states as agent under the federal program for DBEs. The Court states that the basic question raised by the contractors' appeal is the proper characterization of the state's role under the 1987 Congressional Act relating to providing financial assistance to states for highway construction. *Id.* at 422. The Court points out that the Congressional Act offers the states financial assistance, and the receipt of funds under the Federal Act is voluntary, but a state that decides to receive such funds is bound by the federal regulations. *Id.*

The contractors did not question the validity of the 1987 federal Act authorizing the DBE program, the validity of the "set-aside provision" in the Act, or the validity of the federal regulations that implement that provision. *Id.* at 423. The contractors challenged the 1987 Act neither on its face nor as applied. *Id.* But, they argued that the Supreme Court decision in *Croson* prevents the state from playing the role envisaged for it by the Act and federal regulations unless the state is able to show that the "set-aside program", as implemented in Wisconsin, is necessary to rectify invidious discrimination. *Id.* at 423.

The Court found that these arguments, whatever merit they have or lack, are inconsistent with the contractors' decision not to challenge the validity of the federal statute or regulations. *Id.* at 423. The Court held as follows: "Insofar as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal servants who drafted the regulations." *Id.* at 423.

The Court concludes the federal statute contemplates that states which decide to accept funds under it will reserve a portion of those funds for a class of disadvantaged contractors. *Id.* at 423. And, by virtue of a presumption created by federal regulations, which in this case were conceded to be valid, the disadvantaged contractors are likely to consist for the most part of enterprises controlled by members of the favored groups. *Id.* at 423. The Court held that if the state of

Wisconsin does exactly what the statute expects it to do, and the statute is conceded for purposes of the litigation to be constitutional, the state cannot have violated the Constitution. *Id.* at 423.

The federal statute does not "*require*" the states to accept funds under it, but it authorizes them to do so, and the Court states that an action pursuant to a valid authorization is valid. *Id.* at 423. The lesson of the U.S. Supreme Court decisions, including *Croson*, according to the Court, is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do. *Id.* at 424. And, the Court finds one way the federal government can do that is by authorizing states to do things that they could not do without federal authorization. *Id.*

Vulnerable to challenge or impermissible collateral attack depending on if state complied with or exceeded its federal authority. The Court makes clear that the plaintiffs in this case did not challenge the federal "set-aside program", a creature of federal statute and federal regulations. *Id.* at 424. Rather, they challenged the state's role in the federal program. *Id.* The Court thus held as follows: "Insofar as the state is merely doing what the statute and regulations envisage and permit, the attack on the state is an impermissible collateral attack on the statute and regulations." *Id.* at 424.

The Court also held that if the state exceeded its federal authority, it would be vulnerable to challenge under *Croson*. *Id.* at 424. The Court concluded that the state is vulnerable to such challenge insofar as it took the presumption in the federal regulations and applied it to programs not funded under, and therefore not governed by, the federal statute. *Id.*

The district court found that the state exceeded its authority under the federal statute in two other minor ways in addition to applying the presumption in the federal regulations to state funded programs, and the lower court enjoined those violations. *Id.* at 425. The Court agreed with the district court in connection with the ruling that the state exceeded its authority under the federal statute. *Id.* at 425, citing the district court decision in *Milwaukee County Pavers*, 731 F.Supp. at 1413-15. The district court enjoined the State of Wisconsin program in which the state was acting as the principal, not an agent, under a program in which Wisconsin set aside certain exclusively state-funded highway contracts for firms certified as DBEs. *Id.* The state Program was in violation of equal protection based on the absence of showing by the state of Wisconsin that discrimination was necessary to rectify discrimination against such minorities. *Id.*

However, the Court found that the contractors complaint about the state's *administration* of the racial presumption in the federal regulations was not sufficient to rebut the presumption. *Id.* at 425. The contractors acknowledged that they made no effort to present, in proceedings for the certification of DBEs, evidence rebutting the presumption accorded the members of the favored groups. *Id.* The contractors, the Court states, are quarreling with the federal regulation whose validity they have conceded. *Id.*

Holding. The Court held that the state funded program under which Wisconsin "set aside" certain state-funded contracts for firms certified as DBEs racially discriminates in favor of minorities in violation of the Equal Protection Clause because there was no evidence presented by the state showing that discrimination was necessary to rectify discrimination against such

minorities. The Court also held that the state, by accepting federal funds under the federal statute and federal regulations, did not violate equal protection. The Court further held that the state, to the extent it exceeded its authority under the federal law and the federal regulations, its conduct was vulnerable to an equal protection challenge.

9. *The Builders Ass'n of Greater Chicago v. The City of Chicago*, 298 F. Supp.2d 725 (N.D. Ill. 2003)

This case is instructive because of the court's focus and analysis on whether the City of Chicago's MBE/WBE program was narrowly tailored. The basis of the court's holding that the program was not narrowly tailored is instructive for any program considered because of the reasons provided as to why the program did not pass muster.

The plaintiff, the Builders Association of Greater Chicago, brought this suit challenging the constitutionality of the City of Chicago's construction Minority- and Woman-owned Business ("MWBE") Program. The court held that the City of Chicago's MWBE program was unconstitutional because it did not satisfy the requirement that it be narrowly tailored to achieve a compelling governmental interest. The court held that it was not narrowly tailored for several reasons, including because there was no "meaningful individualized review" of MBE/WBEs; it had no termination date nor did it have any means for determining a termination; the "graduation" revenue amount for firms to graduate out of the program was very high, $27,500,000, and in fact very few firms graduated; there was no net worth threshold; and, waivers were rarely or never granted on construction contracts. The court found that the City program was a "rigid numerical quota," not related to the number of available, willing and able firms. Formulistic percentages, the court held, could not survive the strict scrutiny.

The court held that the goals plan did not address issues raised as to discrimination regarding market access and credit. The court found that a goals program does not directly impact prime contractor's selection of subcontractors on non-goals private projects. The court found that a set-aside or goals program does not directly impact difficulties in accessing credit, and does not address discriminatory loan denials or higher interest rates. The court found the City has not sought to attack discrimination by primes directly, "but it could." 298 F.2d 725. "To monitor possible discriminatory conduct it could maintain its certification list and require those contracting with the City to consider unsolicited bids, to maintain bidding records, and to justify rejection of any certified firm submitting the lowest bid. It could also require firms seeking City work to post private jobs above a certain minimum on a website or otherwise provide public notice ..." *Id.*

The court concluded that other race-neutral means were available to impact credit, high interest rates, and other potential marketplace discrimination. The court pointed to race-neutral means including linked deposits, with the City banking at institutions making loans to startup and smaller firms. Other race-neutral programs referenced included quick pay and contract downsizing; restricting self-performance by prime contractors; a direct loan program; waiver of bonds on contracts under $100,000; a bank participation loan program; a 2 percent local business preference; outreach programs and technical assistance and workshops; and seminars presented to new construction firms.

The court held that race and ethnicity do matter, but that racial and ethnic classifications are highly suspect, can be used only as a last resort, and cannot be made by some mechanical formulation. Therefore, the court concluded the City's MWBE Program could not stand in its present guise. The court held that the present program was not narrowly tailored to remedy past discrimination and the discrimination demonstrated to now exist.

The court entered an injunction, but delayed the effective date for six months from the date of its Order, December 29, 2003. The court held that the City had a "compelling interest in not having its construction projects slip back to near monopoly domination by white male firms." The court ruled a brief continuation of the program for six months was appropriate "as the City rethinks the many tools of redress it has available." Subsequently, the court declared unconstitutional the City's MWBE Program with respect to construction contracts and permanently enjoined the City from enforcing the Program. 2004 WL 757697 (N.D. Ill 2004).

10. *Indianapolis Minority Corrections Assoc., Inc. v. Wiley*, 1998 WL 1988826 (S.D. Ind. 1998)

In this case, plaintiffs, an association of Indianapolis Minority Contractors, brought suit to challenge the manner in which the State of Indiana administered its program for minority and disadvantaged businesses that is a part of the federal DBE program, which is regulated by the United States DOT. The plaintiffs contended that state officials and others engaged in wrongful actions in disbursement of federal highway funds to undeserving businesses that did not qualify for the DBE program because they were not controlled by either minority individuals or financially disadvantaged individuals. In addition, the plaintiffs claimed that because of this wrongdoing, they did not receive their fair share of the federal highway funds as minority contractors. The district court stated that this case concerns whether the State of Indiana complied with federal law related to the receipt of Federal Highway funds or whether it engaged in a practice of discrimination with respect to those funds. 1998 WL 1988826 at *10. The district court noted the case did not involve a challenge concerning the State of Indiana Minority Business Enterprise Program that did not involve projects utilizing federal funds.

The district court rejected testimony submitted by the plaintiffs as not meeting standards for expert testimony with regard to claims that the defendants were discriminating against African Americans, because the court concluded the claims were conclusory allegations and opinions, based in part on speculation, hearsay and not on any sufficient probative evidence to support the opinions. 1998 WL 1988826 at *13-15. The court rejected the statistical analysis submitted regarding a disparate impact on African Americans, finding there was no evidence shown concerning any possible error rate, standard deviation or confidence levels related to the proffered results. *Id.* The court found there was no evidence related to whether the proper statistical pool was used to calculate the percentages proffered as evidence of a disparate impact. *Id.* The testimony submitted by the plaintiffs compared Indiana DOT's compliance with the mandatory Federal DBE Program with other states, and concluded that Indiana ranked as one of the worst based on the testimony that Indiana's demographics were 8 to 9 percent black. *Id.* at *14. But, the district court found the state-wide demographic utilized may be a statistical universe larger than the number of firms actually qualified, willing and able to work on the construction contracts. *Id.*

The district court also found that the testimony proffered was not sufficient in connection with the claim that the defendants were discriminating against African Americans. *Id.* at *13. The court stated plaintiffs "merely" concluded that the State was discriminating based upon a review of the percentages of payments which the plaintiffs' witness considered to be "legitimate black companies," as compared to the payments made to what the witness considered to be "front" companies. *Id.* at *13. The court found that these were conclusory opinions based only on the witness's knowledge of "legitimate black companies," and deemed the opinions "problematic." The court stated the witness admitted he had not been involved in activities within the State for many years, and he did not show any basis for his knowledge as to which companies that were paid funds by Indiana DOT were "legitimate black companies" and which were not. *Id.*

The court rejected plaintiffs' witness's opinion concerning his finding that only 3.8 percent of the total contracts went to "legitimate black-owned businesses." The court noted that the regulations do not provide for a 10 percent participation by African Americans, but a 10 percent participation by many groups, including African Americans, and that the witness did not testify as to whether he performed any study of the federal reports to test Indiana DOT's compliance with the 10 percent goal based on *all* DBE as defined by federal law. *Id.* at *13. The district court concluded that unsupported, conclusory testimony is not sufficient. *Id.*

The court also considered the issue raised by the plaintiffs as to whether the then existing federal regulations, 49 C.F.R. Part 23, provided enforceable rights subject to a 42 U.S.C. § 1983 action brought by the plaintiffs. The court concluded that the federal regulations do not provide a basis to conclude that they were intended to provide rights enforceable under Section 1983. *Id.* at *28. The district court found that the federal regulations provide a means to assure that the federal DBE program benefits legitimate DBEs, and provides the Secretary of the United States DOT a means to ensure its integrity. *Id.*

The court stated these regulations provided a method for the USDOT to oversee the services provided by the States, rather than a means to ensure that individual DBEs receive funds for services. *Id.* at *28. The federal regulations do not create an individual entitlement to services, but are a yardstick for the USDOT to measure the system-wide performance of the program. *Id.* Therefore, the district court concluded that although the plaintiffs may benefit from their State's plan implemented in order to receive federal transportation funds, they are only indirect beneficiaries. *Id* at *29. Further, the court held that as the DBE program is not an entitlement program, the regulations implementing the program do not provide enforceable rights under § 1983.

In conclusion, the court held that the plaintiffs may utilize § 1983 to enforce their right to a state-wide plan that complies with the federal requirements for the receipt of federal transportation and highway funds. *Id* at *29. The plaintiffs, the court held, do not have rights under § 1983 to remedy isolated violations of requirements under the plan, which includes claims that certain companies should not have been certified under the DBE program. The court dismissed all claims under 42 U.S.C. § 1983 brought against the State, Indiana DOT and the Indiana Department of Administrative Services and all claims for damages against the State officials sued in their official capacity.

The court then found that Indiana's DBE program met all federal requirements, including ensuring that DBEs have an equitable opportunity to compete for contracts and subcontracts as mandated by 49 C.F.R. § 23.45(c). The court pointed out that Indiana DOT arranges solicitations, time for the presentation of bids, quantities, specifications, and delivery schedules to facilitate participation by DBEs. *Id.* at *35. The district court pointed out that Indiana DOT requires prime contractors to solicit bids from certified DBEs as part of its good-faith efforts requirements, that certified DBEs are provided notices of bids and that these notices are also posted on the Internet and in Indiana Contractors' Association publications. *Id.*

The court also indicated Indiana DOT's Civil Rights Division had a Supportive Services Division that provided managerial and technical assistance to DBEs, training workshops and one-on-one consultations in estimating, bidding, bookkeeping, marketing, financial issues and other areas directed by Indiana DOT. The DBE assistance provided for business planning, bookkeeping, marketing, accounting, estimating, bidding, employee relations, contract negotiations, computerization, financial decisions and other business related issues. Consultants were contracted to perform selected training or individualized assistance to DBEs. *Id.* at *35–36.

Specifically, Indiana DOT provided services to assist DBEs, at no cost to them, including conducting internal orientation sessions for newly certified DBEs; provided training on the metric system through Ivy Tech State College; consulting one-on-one with individual DBE firms to improve their business operations, provided training in finance and bookkeeping analysis, business plan preparation, job cost, cash flow preparation and analysis, bid estimation, computerization, strategic planning, loan packaging assistance and other operations; attended trade fairs, organized meetings, and performed other outreach functions for the purpose of reaching non-certified DBE firms, informing them of Indiana DOT DBE programs, and encouraging them to become certified; referred DBEs to establish state and federal business assistance organizations when appropriate; encouraged DBE firms to contact the civil rights office regarding any problems that arise on the job site or with respect to any aspect of their relationship with Indiana DOT and prime contractors and responded and sought to resolve the problems and complaints in a prompt manner; and provided classroom style training workshops including a twelve-day workshop to instruct 25 to 30 Indiana DBEs on all aspects of operations of the construction business. *Id.* at *35-36.

The court also found that Indiana DOT strived to remove barriers DBEs frequently encountered in other states by not requiring subcontractors to be bonded, and exploring using Supportive Services funding to provide direct financial assistance to DBEs, utilizing funds from the FHWA exclusively for the recruitment of DBEs, managerial and technical assistance to DBEs, and monitoring DBE activities. Indiana DOT also established a mentor-protégé program for contractors on Indiana DOT contracts. *Id.* at *37.

The district court stated that Indiana DOT met its overall 10 percent DBE goal and set practical contract goals on individual contracts complying with the requirements of the federal acts and regulations. In setting the individual contracts goal, the Indiana DOT evaluated each contract individually, including factors such as geographic location of the contract, its size, the number of items that can be performed by certified DBEs, the number of certified DBEs that can perform the work, the relative location of certified DBEs who can and are willing to work in the area, the current workload of those DBEs and DBE prequalification limits. *Id.* at *39.

The district court found that the individual contract goals were not rigid requirements that contractors must meet under all circumstances. The bidder that fails to achieve an individual contract DBE goal may remain eligible to be awarded the contract if it can demonstrate that it has made good faith efforts to meet the goal. Id at *39. The district court pointed out that Indiana DOT's methods to ensure compliance with the federal regulations, reporting and recordkeeping requirements were met by Indiana DOT and that Indiana DOT's Civil Rights Office responded to requests for assistance as a part of its daily activities. *Id.* at *42.

The district court noted that none of the plaintiffs complained to Indiana DOT that he bid on a subcontract to a construction contract administered by Indiana DOT and was denied the bid on the basis of race-based discrimination. *Id.* at *42. The district court analyzed plaintiff's claims that the State does not have a bonding or financial assistance program in place, did not always conduct site visits as part of the DBE certification process, and never met the 10 percent goal requirement. *Id.* at *43. The court in reviewing the federal regulations concluded that the bonding and financial assistance programs were not mandatory requirements of state wide plans, although they were mentioned in the federal regulations. *Id.* at *44.

The district court found that although the State may not always conduct site visits in the certification process, the testimony did not conclusively establish that site visits were not conducted. The court also found that plaintiffs did not establish that Indiana failed to meet the 10 percent goal that existed at this time in the federal regulations. In light of the evidence, the court found that the plaintiffs failed to show any genuine issues of fact regarding the State's compliance with the requirements for the DBE plan necessary to receive federal transportation funds and granted the defendants' Motion for Summary Judgment. *Id.* at *45.

The district court also considered plaintiffs' claims under § 1983 that the State's administration of the required DBE program violated their rights under the Equal Protection Clause of the Fourteenth Amendment. The court found that the plaintiffs produced no evidence that showed a race-based or discriminatory policy of the State, or barrier otherwise imposed by the State, that impeded the plaintiffs' ability to bid on contracts. *Id* at *48. The district court found that the plaintiffs did not show how they were treated differently from all other qualified DBEs in their efforts to obtain contracts, and that the State of Indiana does not have the power to modify the Congressional mandate that all certified DBEs are to compete on an equal basis. *Id.* Thus, the court rejected the plaintiffs' argument that because woman-owned DBEs are receiving a disproportionate share of federally funded contracts, a discriminatory practice must be in place. *Id.*

The district court held that the plaintiffs could not show any discriminatory intent by the State of Indiana. Plaintiffs alleged that defendants had raised barriers to their participation in contracts funded by federal dollars and that they had not received their fair percentage of the contracts compared to non-African American DBEs. The court found the plaintiffs failed to demonstrate that such barriers exist, and that they did not demonstrate how they had been treated differently than the other similarly situated minority and disadvantaged enterprises served by the DBE program. *Id.* at *49. The court held that a showing of a disproportionate impact is not enough, as a state's "official action will not be held unconstitutional solely because it results in a racially disproportionate impact ... Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at *49. (citations omitted).

Lastly, the district court pointed out that the plaintiffs did not challenge the constitutionality of the federal DBE program, but only challenged the State's administration of that program. *Id.* at *50. Thus, the court held "If the DOA and INDOT are only doing 'what federal law requires, [their] conduct is constitutional, at least where, as here, the constitutionality of the federal program is not challenged.'" *Id.* at *50, quoting *Converse Construction Co., Inc. v. Massachusetts Bay Transportation Authority*, 899 F.Supp. 753, 761 (D.Mass. 1995)(*citing Milwaukee Co. Pavers*, 922 F.2d at 423). The court noted that the Second, Sixth, and Tenth Circuits reached the similar conclusion that insofar as the State is merely complying with federal law, it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations. *Id.* at *50 (citations omitted).

Therefore, the court granted summary judgment to the defendants finding that they were complying with federal law and could not be enjoined under the Equal Protection Clause or under a claim based on Title VI.

E. Recent Decisions Involving State or Local Government MBE/WBE Programs in Other Jurisdictions

Recent Decisions in Federal Circuit Courts of Appeal

1. *H. B. Rowe Co., Inc. v. W. Lyndo Tippett*, NCDOT, et al., 615 F.3d 233 (4th Cir. 2010)

The State of North Carolina enacted statutory legislation that required prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-funded projects. (See facts as detailed in the decision of the United States District Court for the Eastern District of North Carolina discussed below.). The plaintiff, a prime contractor, brought this action after being denied a contract because of its failure to demonstrate good faith efforts to meet the participation goals set on a particular contract that it was seeking an award to perform work with the North Carolina Department of Transportation ("NCDOT"). Plaintiff asserted that the participation goals violated the Equal Protection Clause and sought injunctive relief and money damages.

After a bench trial, the district court held the challenged statutory scheme constitutional both on its face and as applied, and the plaintiff prime contractor appealed. 615 F.3d 233 at 236. The Court of Appeals held that the State did not meet its burden of proof in all respects to uphold the validity of the state legislation. But, the Court agreed with the district court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to African American and Native American subcontractors, and that the State demonstrated that the legislative scheme is narrowly tailored to serve its compelling interest in remedying discrimination against these racial groups. The Court thus affirmed the decision of the district court in part, reversed it in part and remanded for further proceedings consistent with the opinion. *Id.*

The Court found that the North Carolina statutory scheme "largely mirrored the federal Disadvantaged Business Enterprise ("DBE") program, with which every state must comply in awarding highway construction contracts that utilize federal funds." 615 F.3d 233 at 236. The Court also noted that federal courts of appeal "have uniformly upheld the Federal DBE Program

against equal-protection challenges." *Id.*, at footnote 1, *citing, Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147 (10th Cir. 2000).

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina's highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id.*

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 5 and 10 percent annual goals that were set in the predecessor statute. 615 F.3d 233 at 238-239. Instead, as amended, the statute requires the NCDOT to "establish annual aspirational goals, not mandatory goals, ... for the overall participation in contracts by disadvantaged minority-owned and woman-owned businesses ... [that] shall not be applied rigidly on specific contracts or projects." *Id.* at 239, quoting, N.C. Gen.Stat. § 136-28.4(b)(2010). The statute further mandates that the NCDOT set "contract-specific goals or project-specific goals ... for each disadvantaged minority-owned and woman-owned business category that has demonstrated significant disparity in contract utilization" based on availability, as determined by the study. *Id.*

Third, the amended statute narrowed the definition of "minority" to encompass only those groups that have suffered discrimination. *Id.* at 239. The amended statute replaced a list of defined minorities to any certain groups by defining "minority" as "only those racial or ethnicity classifications identified by [the study] ... that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department." *Id.* at 239 quoting section 136-28.4(c)(2)(2010).

Fourth, the amended statute required the NCDOT to reevaluate the Program over time and respond to changing conditions. 615 F.3d 233 at 239. Accordingly, the NCDOT must conduct a study similar to the 2004 study at least every five years. *Id.* § 136-28.4(b). Finally, the amended statute contained a sunset provision which was set to expire on August 31, 2009, but the General Assembly subsequently extended the sunset provision to August 31, 2010. *Id.* Section 136-28.4(e) (2010).

The Court also noted that the statute required only good faith efforts by the prime contractors to utilize subcontractors, and that the good faith requirement, the Court found, proved permissive in practice: prime contractors satisfied the requirement in 98.5 percent of cases, failing to do so in only 13 of 878 attempts. 615 F.3d 233 at 239.

Strict scrutiny. The Court stated the strict scrutiny standard was applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically "fatal in fact." 615 F.3d 233 at 241. The Court pointed out that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* at 241 quoting *Alexander v. Estepp,* 95 F.3d 312, 315 (4th Cir. 1996). In so acting, a governmental entity

must demonstrate it had a compelling interest in "remedying the effects of past or present racial discrimination." *Id.*, quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

Thus, the Court found that to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary. 615 F.3d 233 at 241 quoting, *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion).

The Court significantly noted that: "There is no 'precise mathematical formula to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark.'" 615 F.3d 233 at 241, quoting *Rothe Dev. Corp. v. Department of Defense*, 545 F.3d 1023, 1049 (Fed.Cir. 2008). The Court stated that the sufficiency of the State's evidence of discrimination "must be evaluated on a case-by-case basis." *Id.* at 241. (internal quotation marks omitted).

The Court held that a state "need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. 615 F.3d 233 at 241, *citing Concrete Works*, 321 F.3d at 958. "Instead, a state may meet its burden by relying on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. *Id.* at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion). The Court stated that we "further require that such evidence be 'corroborated by significant anecdotal evidence of racial discrimination.'" *Id.* at 241, quoting *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993).

The Court pointed out that those challenging race-based remedial measures must "introduce credible, particularized evidence to rebut" the state's showing of a strong basis in evidence for the necessity for remedial action. *Id.* at 241-242, *citing Concrete Works*, 321 F.3d at 959. Challengers may offer a neutral explanation for the state's evidence, present contrasting statistical data, or demonstrate that the evidence is flawed, insignificant, or not actionable. *Id.* at 242 (citations omitted). However, the Court stated "that mere speculation that the state's evidence is insufficient or methodologically flawed does not suffice to rebut a state's showing. *Id.* at 242, *citing Concrete Works*, 321 F.3d at 991.

The Court held that to satisfy strict scrutiny, the state's statutory scheme must also be "narrowly tailored" to serve the state's compelling interest in not financing private discrimination with public funds. 615 F.3d 233 at 242, *citing Alexander*, 95 F.3d at 315 (*citing Adarand*, 515 U.S. at 227).

Intermediate scrutiny. The Court held that courts apply "intermediate scrutiny" to statutes that classify on the basis of gender. *Id.* at 242. The Court found that a defender of a statute that classifies on the basis of gender meets this intermediate scrutiny burden "by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.*, quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). The Court noted that intermediate scrutiny requires less of a showing than does "the most exacting" strict scrutiny standard of review. *Id.* at 242. The Court found that its "sister circuits" provide guidance in formulating a governing evidentiary standard for intermediate scrutiny. These courts agree that

such a measure "can rest safely on something less than the 'strong basis in evidence' required to bear the weight of a race- or ethnicity-conscious program." *Id.* at 242, quoting *Engineering Contractors*, 122 F.3d at 909 (other citations omitted).

In defining what constitutes "something less" than a 'strong basis in evidence,' the courts, ... also agree that the party defending the statute must 'present [ ] sufficient probative evidence in support of its stated rationale for enacting a gender preference, *i.e.*,...the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations." 615 F.3d 233 at 242 quoting *Engineering Contractors*, 122 F.3d at 910 and *Concrete Works*, 321 F.3d at 959. The gender-based measures must be based on "reasoned analysis rather than on the mechanical application of traditional, often inaccurate, assumptions." *Id.* at 242 quoting *Hogan*, 458 U.S. at 726.

Plaintiff's burden. The Court found that when a plaintiff alleges that a statute violates the Equal Protection Clause as applied and on its face, the plaintiff bears a heavy burden. In its facial challenge, the Court held that a plaintiff "has a very heavy burden to carry, and must show that [a statutory scheme] cannot operate constitutionally under any circumstance." *Id.* at 243, quoting *West Virginia v. U.S. Department of Health & Human Services*, 289 F.3d 281, 292 (4th Cir. 2002).

Statistical evidence. The Court examined the State's statistical evidence of discrimination in public-sector subcontracting, including its disparity evidence and regression analysis. The Court noted that the statistical analysis analyzed the difference or disparity between the amount of subcontracting dollars minority- and woman-owned businesses actually won in a market and the amount of subcontracting dollars they would be expected to win given their presence in that market. 615 F.3d 233 at 243. The Court found that the study grounded its analysis in the "disparity index," which measures the participation of a given racial, ethnic, or gender group engaged in subcontracting. *Id.* In calculating a disparity index, the study divided the percentage of total subcontracting dollars that a particular group won by the percent that group represents in the available labor pool, and multiplied the result by 100. *Id.* The closer the resulting index is to 100, the greater that group's participation. *Id.*

The Court held that after *Croson*, a number of our sister circuits have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority- and woman-owned businesses. *Id.* at 243-244 (Citations to multiple federal circuit court decisions omitted.) The Court also found that generally "courts consider a disparity index lower than 80 as an indication of discrimination." *Id.* at 244. Accordingly, the study considered only a disparity index lower than 80 as warranting further investigation. *Id.*

The Court pointed out that after calculating the disparity index for each relevant racial or gender group, the consultant tested for the statistical significance of the results by conducting standard deviation analysis through the use of t-tests. The Court noted that standard deviation analysis "describes the probability that the measured disparity is the result of mere chance." 615 F.3d 233 at 244, quoting *Eng'g Contractors*, 122 F.3d at 914. The consultant considered the finding of two standard deviations to demonstrate "with 95 percent certainty that disparity, as represented by either overutilization or underutilization, is actually present." *Id., citing Eng'g Contractors*, 122 F.3d at 914.

The study analyzed the participation of minority and women subcontractors in construction contracts awarded and managed from the central NCDOT office in Raleigh, North Carolina. 615 F.3d 233 at 244. To determine utilization of minority and women subcontractors, the consultant developed a master list of contracts mainly from State-maintained electronic databases and hard copy files; then selected from that list a statistically valid sample of contracts, and calculated the percentage of subcontracting dollars awarded to minority- and woman-owned businesses during the 5-year period ending in June 2003. (The study was published in 2004). *Id.* at 244.

The Court found that the use of data for centrally-awarded contracts was sufficient for its analysis. It was noted that data from construction contracts awarded and managed from the NCDOT divisions across the state and from preconstruction contracts, which involve work from engineering firms and architectural firms on the design of highways, was incomplete and not accurate. 615 F.3d 233 at 244, n.6. These data were not relied upon in forming the opinions relating to the study. *Id.* at 244, n. 6.

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id.* at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id.* at 245.

Based on the utilization and availability figures, the study prepared the disparity analysis comparing the utilization based on the percentage of subcontracting dollars over the five year period, determining the availability in numbers of firms and their percentage of the labor pool, a disparity index which is the percentage of utilization in dollars divided by the percentage of availability multiplied by 100, and a T Value. 615 F.3d 233 at 245.

The Court concluded that the figures demonstrated prime contractors underutilized all of the minority subcontractor classifications on state-funded construction contracts during the study period. 615 F.3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. *Id.* The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. *Id.* For African Americans the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. *Id.* The Court found there was at least a 95 percent probability that prime contractors' underutilization of African American subcontractors was *not* the result of mere chance. *Id.*

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F.3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. *Id.*

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics – with a particular focus on owner race and gender – on a firm's gross revenues. 615 F.3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the NCDOT. The survey pool consisted of a random sample of such firms. *Id.*

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. 615 F.3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. *Id.* These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id.*

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than "vendor data." 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id.* The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. *Id.* at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence," and that the plaintiff Rowe presented no viable alternative for determining availability. *Id.* at 246-247, *citing Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

The Court also rejected the plaintiff's argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state's response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. *Id.* The Court concluded plaintiff did not offer any contrary evidence. *Id.*

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under $500,000 was not a function of capacity. *Id.* at 247. Further, the State showed that over 90 percent of the NCDOT's subcontracts were valued at $500,000 or less, and that capacity constraints do not operate with the same force on

subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id.* at 247. The Court pointed out that the Court in *Rothe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id.* at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff's argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors – nearly 38 percent – "surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors' reduced utilization of these groups during the suspension." *Id.* at 248, *citing Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued "strongly supports the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.") The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id.* at 248.

Anecdotal evidence. The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal "good old boy" network of white contractors that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id.* at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id.*

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id.* at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id.*

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the "good old boy network" affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned firms; and that prime contractors

use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due, did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. *Id.* at 249.

The Court rejected the plaintiffs' contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State's "unverified" anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot-be verified because it "is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions." 615 F.3d 233 at 249, quoting *Concrete Works*, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id.* at 249. The Court rejected plaintiffs' argument that the study oversampled representatives from minority groups, and found that surveying more non-minority men would not have advanced the inquiry. *Id.* at 249. It was noted that the samples of the minority groups were randomly selected. *Id.* The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. *Id.* at 249.

Strong basis in evidence that the minority participation goals were necessary to remedy discrimination. The Court held that the State presented a "strong basis in evidence" for its conclusion that minority participation goals were necessary to remedy discrimination against African American and Native American subcontractors." 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State's data demonstrated that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study. *Id.* at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. *Id.* at 250.

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression analysis demonstrating that African American ownership correlated with a significant, negative impact on firm revenue, and demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. *Id.*

Thus, the Court held the State's evidence showing a gross statistical disparity between the availability of qualified American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250. The Court then found that the State's anecdotal evidence of discrimination against these two groups sufficiently supplemented the State's statistical showing. *Id.* The survey in the

study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. *Id.* at 251. The Court held that the State could conclude with good reason that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id.* The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id.* at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by "disturbing" anecdotal evidence.

The Court held in circumstances like these, the Supreme Court has made it abundantly clear a state can remedy a public contracting system that withholds opportunities from minority groups because of their race. 615 F.3d 233 at 251-252.

Narrowly tailored. The Court then addressed whether the North Carolina statutory scheme was narrowly tailored to achieve the State's compelling interest in remedying discrimination against African American and Native American subcontractors in public-sector subcontracting. The following factors were considered in determining whether the statutory scheme was narrowly tailored.

Neutral measures. The Court held that narrowly tailoring requires "serious, good faith consideration of workable race-neutral alternatives," but a state need not "exhaust [ ] ... every conceivable race-neutral alternative." 615 F.3d 233 at 252 quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina. *Id.* at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain small business contracts of $500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id.* at 252.

The Court found that plaintiff identified no viable race-neutral alternatives that North Carolina had failed to consider and adopt. The Court also found that the State had undertaken most of the race-neutral alternatives identified by USDOT in its regulations governing the Federal DBE Program. 615 F.3d 233 at 252, *citing* 49 C.F.R. § 26.51(b). The Court concluded that the State gave serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. *Id.*

The Court concluded that despite these race-neutral efforts, the study demonstrated disparities continue to exist in the utilization of African American and Native American subcontractors in state-funded highway construction subcontracting, and that these "persistent disparities indicate the necessity of a race-conscious remedy." 615 F.3d 233 at 252.

Duration. The Court agreed with the district court that the program was narrowly tailored in that it set a specific expiration date and required a new disparity study every five years. 615 F.3d 233 at 253. The Court found that the program's inherent time limit and provisions requiring regular reevaluation ensure it is carefully designed to endure only until the discriminatory

impact has been eliminated. *Id.* at 253, *citing Adarand Constructors v. Slater*, 228 F.3d at 1179 (quoting *United States v. Paradise, 480 U.S.* 149, 178 (1987)).

Program's goals related to percentage of minority subcontractors. The Court concluded that the State had demonstrated that the Program's participation goals are related to the percentage of minority subcontractors in the relevant markets in the State. 615 F.3d 233 at 253. The Court found that the NCDOT had taken concrete steps to ensure that these goals accurately reflect the availability of minority-owned businesses on a project-by-project basis. *Id.*

Flexibility. The Court held that the Program was flexible and thus satisfied this indicator of narrow tailoring. 615 F.3d 233 at 253. The Program contemplated a waiver of project-specific goals when prime contractors make good faith efforts to meet those goals, and that the good faith efforts essentially require only that the prime contractor solicit and consider bids from minorities. *Id.* The State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid. *Id.* The Court found there was a lenient standard and flexibility of the "good faith" requirement, and noted the evidence showed only 13 of 878 good faith submissions failed to demonstrate good faith efforts. *Id.*

Burden on non-MWBE/DBEs. The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

Overinclusive. The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

In sum, the Court held that the statutory scheme is narrowly tailored to achieve the State's compelling interest in remedying discrimination in public-sector subcontracting against African American and Native American subcontractors. *Id.* at 254.

Woman-owned businesses overutilized. The study's public-sector disparity analysis demonstrated that woman-owned businesses won far more than their expected share of subcontracting dollars during the study period. 615 F.3d 233 at 254. In other words, the Court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects. *Id.* The Court found the public-sector evidence did not evince the "exceedingly persuasive justification" the Supreme Court requires. *Id.* at 255.

The Court noted that the State relied heavily on private-sector data from the study attempting to demonstrate that prime contractors significantly underutilized women subcontractors in the

general construction industry statewide and in the Charlotte, North Carolina area. 615 F.3d 233 at 255. However, because the study did not provide a t-test analysis on the private-sector disparity figures to calculate statistical significance, the Court could not determine whether this private underutilization was "the result of mere chance." *Id.* at 255. The Court found troubling the "evidentiary gap" that there was no evidence indicating the extent to which woman-owned businesses competing on public-sector road projects vied for private-sector subcontracts in the general construction industry. *Id.* at 255. The Court also found that the State did not present any anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination. *Id.* In addition, the Court found missing any evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. *Id.*

The Court pointed out that it did not suggest that the proponent of a gender-conscious program "must always tie private discrimination to public action." 615 F.3d 233 at 255, n. 11. But, the Court held where, as here, there existed substantial probative evidence of overutilization in the relevant public sector, a state must present something more than generalized private-sector data unsupported by compelling anecdotal evidence to justify a gender-conscious program. *Id.* at 255, n. 11.

Moreover, the Court found the state failed to establish the amount of overlap between general construction and road construction subcontracting. 615 F.3d 233 at 256. The Court said that the dearth of evidence as to the correlation between public road construction subcontracting and private general construction subcontracting severely limits the private data's probative value in this case. *Id.*

Thus, the Court held that the State could not overcome the strong evidence of overutilization in the public sector in terms of gender participation goals, and that the proffered private-sector data failed to establish discrimination in the particular field in question. 615 F.3d 233 at 256. Further, the anecdotal evidence, the Court concluded, indicated that most women subcontractors do not experience discrimination. *Id.* Thus, the Court held that the State failed to present sufficient evidence to support the Program's current inclusion of women subcontractors in setting participation goals. *Id.*

Holding. The Court held that the state legislature had crafted legislation that withstood the constitutional scrutiny. 615 F.3d 233 at 257. The Court concluded that in light of the statutory scheme's flexibility and responsiveness to the realities of the marketplace, and given the State's strong evidence of discrimination again African American and Native American subcontractors in public-sector subcontracting, the State's application of the statute to these groups is constitutional. *Id.* at 257. However, the Court also held that because the State failed to justify its application of the statutory scheme to women, Asian American, and Hispanic American subcontractors, the Court found those applications were not constitutional.

Therefore, the Court affirmed the judgment of the district court with regard to the facial validity of the statute, and with regard to its application to African American and Native American subcontractors. 615 F.3d 233 at 258. The Court reversed the district court's judgment insofar as it upheld the constitutionality of the state legislature as applied to women, Asian American and

Hispanic American subcontractors. *Id.* The Court thus remanded the case to the district court to fashion an appropriate remedy consistent with the opinion. *Id.*

Concurring opinions. It should be pointed out that there were two concurring opinions by the three Judge panel: one judge concurred in the judgment, and the other judge concurred fully in the majority opinion and the judgment.

2. *Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development*, 438 F.3d 195 (2d Cir. 2006)

This recent case is instructive in connection with the determination of the groups that may be included in a MBE/WBE-type program, and the standard of analysis utilized to evaluate a local government's non-inclusion of certain groups. In this case, the Second Circuit Court of Appeals held racial classifications that are challenged as "under-inclusive" (*i.e.*, those that exclude persons from a particular racial classification) are subject to a "rational basis" review, not strict scrutiny.

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 C.F.R. § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race." *Id.* at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise ("DBE") under the federal regulations. *Id.*

However, unlike the federal regulations, the State of New York's local minority-owned business program included in its definition of minorities "Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race." The definition did not include all persons from, or descendants of persons from, Spain or Portugal. *Id.* Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. *Id.* at 202-03. The plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of "Hispanic" was fatally under-inclusive. *Id.* at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis "allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program." *Id.* at 206. The court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. *Id.* at 207-08. The court similarly rejected the argument that the state should mirror the federal definition of "Hispanic," finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. *Id.* at 209.

The court opined — without deciding — that it may be impermissible for New York to simply adopt the "federal USDOT definition of Hispanic without at least making an independent assessment of discrimination against Hispanics of Spanish Origin in New York." *Id.* Additionally, finding that the plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the court determined that the rational basis analysis was appropriate. *Id.* at 213.

The court held that the plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York's decision to exclude persons of Spanish and Portuguese descent irrational; and (3) because the fact New York may have relied on Census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial legislation. *Id.* at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

3. *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion)

Although it is an unpublished opinion, *Virdi v. DeKalb County School District* is a recent Eleventh Circuit decision reviewing a challenge to a local government MBE/WBE-type program, which is instructive to the disparity study. In *Virdi*, the Eleventh Circuit struck down a MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on the failure of the DeKalb County School District (the "District") to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the "Board") and the Superintendent (both individually and in his official capacity) (collectively "defendants") pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11th Cir. 2005). Virdi also alleged the school district's Minority Vendor Involvement Program was facially unconstitutional. *Id.*

The district court initially granted the defendants' Motions for Summary Judgment on all of Virdi's claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. *Id.* On remand, the district court granted the defendants' Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants' motion for a judgment as a matter of law on the remaining claims at the close of Virdi's case. *Id.*

In 1989, the Board appointed the Tillman Committee (the "Committee") to study participation of female- and minority-owned businesses with the District. *Id.* The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id.* Based upon a "general feeling" that minorities

were under-represented, the Committee issued the Tillman Report (the "Report") stating "the Committee's impression that '[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community." *Id.* The Report contained no specific evidence of past discrimination or any factual findings of discrimination. *Id.*

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a "how to" booklet to be made available to any business interested in doing business with the District.

Id. The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id.* The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id.*

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the "how to" booklet. *Id.* The Board also implemented the Minority Vendor Involvement Program (the "MVP") which adopted the participation goals set forth in the Report. *Id.* at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id.* Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. *Id.* Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. *Id.* In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. *Id.* In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected not based upon his qualifications, but because the "District was only looking for 'black-owned firms.'" *Id.* Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id.*

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id.* at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id.* Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id.*

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. *Id.* at 267. The court first questioned whether the identified government interest was compelling. *Id.* at 268. However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. *Id.*

The court held the MVP was not narrowly tailored for two reasons. *Id.* First, because no evidence existed that the District considered race-neutral alternatives to "avoid unwitting discrimination."

The court found that "[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake." *Id., citing Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. *Id.* at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. *Id.* at 268.

Second, the court held that the unlimited duration of the MVP's racial goals negated a finding of narrow tailoring. *Id.* "[R]ace conscious ... policies must be limited in time." *Id., citing Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id.* at 268.

With respect to Virdi's claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Virdi to lose a contract that he would have otherwise received. *Id.* Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court's grant of judgment on that issue. *Id.* at 269. Similarly, the court found that Virdi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and affirmed the district court's order granting defendants' motion on the issue of intentional discrimination against Virdi. *Id.* at 270.

4. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), cert. denied, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari)

This case is instructive to the disparity study because it is one of the only recent decisions to uphold the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

In *Concrete Works* the United States Court of Appeals for the Tenth Circuit held that the City and County of Denver had a compelling interest in limiting race discrimination in the construction industry, that the City had an important governmental interest in remedying gender discrimination in the construction industry, and found that the City and County of Denver had established a compelling governmental interest to have a race- and gender-based program. In *Concrete Works*, the Court of Appeals did not address the issue of whether the MWBE Ordinance was narrowly tailored because it held the district court was barred under the law of the case doctrine from considering that issue since it was not raised on appeal by the plaintiff

construction companies after they had lost that issue on summary judgment in an earlier decision. Therefore, the Court of Appeals did not reach a decision as to narrowly tailoring or consider that issue in the case.

Case history. Plaintiff, Concrete Works of Colorado, Inc. ("CWC") challenged the constitutionality of an "affirmative action" ordinance enacted by the City and County of Denver (hereinafter the "City" or "Denver"). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects. *Id.*

The City enacted an Ordinance No. 513 ("1990 Ordinance") containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id.* at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using "good faith efforts." *Id.* In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the "1996 Ordinance"). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for MBE/WBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id.* at 956-57.

The 1996 Ordinance was amended in 1998 by Ordinance No. 948 (the "1998 Ordinance"). The 1998 Ordinance reduced annual percentage goals and prohibited an MBE or a WBE, acting as a bidder, from counting self-performed work toward project goals. *Id.* at 957.

CWC filed suit challenging the constitutionality of the 1990 Ordinance. *Id.* The district court conducted a bench trial on the constitutionality of the three ordinances. *Id.* The district court ruled in favor of CWC and concluded that the ordinances violated the Fourteenth Amendment. *Id.* The City then appealed to the Tenth Circuit Court of Appeals. *Id.* The Court of Appeals reversed and remanded. *Id.* at 954.

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. *Id.* at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity "can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment." 488 U.S. 469, 492 (1989) (plurality opinion). Because "an effort to alleviate the effects of *societal* discrimination is not a compelling interest," the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination "with some specificity," and (2) demonstrated that a "strong basis in evidence" supports its conclusion that remedial action is necessary. *Id.* at 958, quoting *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

The court held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination. *Id.* Rather, Denver could rely on "empirical evidence that demonstrates 'a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the

locality's prime contractors.'" *Id.*, quoting *Croson*, 488 U.S. at 509 (plurality opinion). Furthermore, the Court of Appeals held that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area (MSA) and could supplement the statistical evidence with anecdotal evidence of public and private discrimination. *Id.*

The Court of Appeals held that Denver could establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. *Id.* The Court of Appeals held that once Denver met its burden, CWC had to introduce "credible, particularized evidence to rebut [Denver's] initial showing of the existence of a compelling interest, which could consist of a neutral explanation for the statistical disparities." *Id.* (internal citations and quotations omitted). The Court of Appeals held that CWC could also rebut Denver's statistical evidence "by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data." *Id.* (internal citations and quotations omitted). The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances. *Id.* at 960.

The Court of Appeals held that to meet its burden of demonstrating an important governmental interest per the intermediate scrutiny analysis, Denver must show that the gender-based measures in the ordinances were based on "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions." *Id.*, quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

The studies. Denver presented historical, statistical and anecdotal evidence in support of its MBE/WBE programs. Denver commissioned a number of studies to assess its MBE/WBE programs. *Id.* at 962. The consulting firm hired by Denver utilized disparity indices in part. *Id.* at 962. The 1990 Study also examined MBE and WBE utilization in the overall Denver MSA construction market, both public and private. *Id.* at 963.

The consulting firm also interviewed representatives of MBEs, WBEs, majority-owned construction firms, and government officials. *Id.* Based on this information, the 1990 Study concluded that, despite Denver's efforts to increase MBE and WBE participation in Denver Public Works projects, some Denver employees and private contractors engaged in conduct designed to circumvent the goals program. *Id.* After reviewing the statistical and anecdotal evidence contained in the 1990 Study, the City Council enacted the 1990 Ordinance. *Id.*

After the Tenth Circuit decided Concrete Works II, Denver commissioned another study (the "1995 Study"). *Id.* at 963. Using 1987 Census Bureau data, the 1995 Study again examined utilization of MBEs and WBEs in the construction and professional design industries within the Denver MSA. *Id.* The 1995 Study concluded that MBEs and WBEs were more likely to be one-person or family-run businesses. The Study concluded that Hispanic-owned firms were less likely to have paid employees than white-owned firms but that Asian/Native American-owned firms were more likely to have paid employees than white- or other minority-owned firms. To determine whether these factors explained overall market disparities, the 1995 Study used the Census data to calculate disparity indices for all firms in the Denver MSA construction industry and separately calculated disparity indices for firms with paid employees and firms with no paid employees. *Id.* at 964.

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and woman-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id.*

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id.* at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id.*

In 1997, the City conducted another study to estimate the availability of MBEs and WBEs and to examine, *inter alia,* whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City (the "1997 Study"). *Id.* at 966. The 1997 Study used geographic and specialization information to calculate MBE/WBE availability. Availability was defined as "the ratio of MBE/WBE firms to the total number of firms in the four-digit SIC codes and geographic market area relevant to the City's contracts." *Id.*

The 1997 Study compared MBE/WBE availability and utilization in the Colorado construction industry. *Id.* The statewide market was used because necessary information was unavailable for the Denver MSA. *Id.* at 967. Additionally, data collected in 1987 by the Census Bureau was used because more current data was unavailable. The Study calculated disparity indices for the statewide construction market in Colorado as follows: 41 for African American firms, 40 for Hispanic firms, 14 for Asian and other minorities, and 74 for woman-owned firms. *Id.*

The 1997 Study also contained an analysis of whether African Americans, Hispanics, or Asian Americans working in the construction industry are less likely to be self-employed than similarly situated whites. *Id.* Using data from the Public Use Microdata Samples ("PUMS") of the 1990 Census of Population and Housing, the Study used a sample of individuals working in the construction industry. The Study concluded that in both Colorado and the Denver MSA, African Americans, Hispanics, and Native Americans working in the construction industry had lower

self-employment rates than whites. Asian Americans had higher self-employment rates than whites.

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. *Id.* Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. *Id.* at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. *Id.*

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: "How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements ... also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?" Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were "seldom or never" used on non-goals projects. *Id.*

MBE/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification requirements, and (8) previous dealings with an agency. This question was also asked of non-MBE/WBEs in a separate survey. With one exception, MBE/WBEs considered each aspect of procurement more problematic than non-MBE/WBEs. To determine whether a firm's size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single exception, MBE/WBEs had more difficulties than non-MBE/WBEs with the same characteristics. *Id.* at 968-69.

After the 1997 Study was completed, the City enacted the 1998 Ordinance. The 1998 Ordinance reduced the annual goals to 10 percent for both MBEs and WBEs and eliminated a provision which previously allowed MBE/WBEs to count their own work toward project goals. *Id.* at 969.

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and woman-owned construction firms that they were subject to different work rules than majority-owned firms. *Id.* He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-

owned firms refused to hire minority- or woman-owned subcontractors because they believed those firms were not competent. *Id.*

Several MBE/WBE witnesses testified that they experienced difficulty prequalifying for private sector projects and projects with the City and other governmental entities in Colorado. One individual testified that her company was required to prequalify for a private sector project while no similar requirement was imposed on majority-owned firms. Several others testified that they attempted to prequalify for projects but their applications were denied even though they met the prequalification requirements. *Id.*

Other MBE/WBEs testified that their bids were rejected even when they were the lowest bidder; that they believed they were paid more slowly than majority-owned firms on both City projects and private sector projects; that they were charged more for supplies and materials; that they were required to do additional work not part of the subcontracting arrangement; and that they found it difficult to join unions and trade associations. *Id.* There was testimony detailing the difficulties MBE/WBEs experienced in obtaining lines of credit. One WBE testified that she was given a false explanation of why her loan was declined; another testified that the lending institution required the co-signature of her husband even though her husband, who also owned a construction firm, was not required to obtain her co-signature; a third testified that the bank required her father to be involved in the lending negotiations. *Id.*

The court also pointed out anecdotal testimony involving recitations of racially- and gender-motivated harassment experienced by MBE/WBEs at work sites. There was testimony that minority and female employees working on construction projects were physically assaulted and fondled, spat upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of 80 feet. *Id.* at 969-70.

The legal framework applied by the court. The Court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver's evidence showed that there is pervasive discrimination. *Id.* at 970. The court, quoting *Concrete Works II*, stated that "the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination." *Id.* at 970, quoting *Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994). Denver's initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that "approaching a *prima facie* case of a constitutional or statutory violation," not irrefutable or definitive proof of discrimination. *Id.* at 97, quoting *Croson*, 488 U.S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver's "evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.*, quoting *Adarand VII*, 228 F.3d at 1176.

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver's evidence did not suffer from the problem discussed by the court in *Croson*. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver

passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The *Croson* majority concluded that a "city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market." *Id.* at 971, quoting *Croson*, 488 U.S. 503. Thus, the Court held Denver's burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. *Id., citing Croson*, 488 U.S. at 503. Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the Court, was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. *Id.* at 972.

The court found Denver's statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver's evidence on that basis. *Id.*

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. *Id.* at 973. The court rejected the district court's erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in *Concrete Works II* and the plurality opinion in *Croson. Id.* The court held it previously recognized in this case that "a municipality has a compelling interest in taking affirmative steps to remedy both public *and private* discrimination specifically identified in its area." *Id.*, quoting *Concrete Works II,* 36 F.3d at 1529 (emphasis added). In *Concrete Works II,* the court stated that "we do not read Croson as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination." *Id.*, quoting *Concrete Works II,* 36 F.3d at 1529.

The court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination. *Id.* at 973. Thus, Denver was not required to demonstrate that it is "guilty of prohibited discrimination" to meet its initial burden. *Id.*

Additionally, the court had previously concluded that Denver's statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that "local prime contractors" are engaged in racial and gender discrimination. *Id.* at 974, quoting *Concrete Works II,* 36 F.3d at 1529. Thus, the court held Denver's disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination. *Id.*

The Court's rejection of CWC's arguments and the district court findings

Use of marketplace data. The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. *Id.* at 974. The court found that the district court's conclusion was directly contrary to the holding in Adarand VII that evidence of both public and private discrimination in the construction industry is relevant. *Id., citing* Adarand VII, 228 F.3d at 1166-67).

The court held the conclusion reached by the majority in *Croson* that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in *Shaw v. Hunt. Id.* at 975. In *Shaw,* a majority of the court relied on the majority opinion in *Croson* for the broad proposition that a governmental entity's "interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." *Id.*, quoting *Shaw*, 517 U.S. at 909. The *Shaw* court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The court, however, did set out two conditions that must be met for the governmental entity to show a compelling interest. "First, the discrimination must be identified discrimination." *Id.* at 976, quoting *Shaw*, 517 U.S. at 910. The City can satisfy this condition by identifying the discrimination, "'*public or private,* with some specificity.' " *Id.* at 976, *citing Shaw*, 517 U.S. at 910, quoting *Croson,* 488 U.S. at 504 (emphasis added). The governmental entity must also have a "strong basis in evidence to conclude that remedial action was necessary." *Id.* Thus, the court concluded *Shaw* specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality's burden of producing strong evidence. *Id.* at 976.

In *Adarand VII,* the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. *Id., citing Adarand VII,* 228 F.3d at 1166-67 ("[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*" (emphasis added)). Further, the court pointed out in this case it earlier rejected the argument CWC reasserted here that marketplace data are irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to "the Denver MSA evidence of industry-wide discrimination." *Id.*, quoting *Concrete Works II,* 36 F.3d at 1529. The court stated that evidence explaining "the Denver government's role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*" was relevant to Denver's burden of producing strong evidence. *Id.*, quoting *Concrete Works II,* 36 F.3d at 1530 (emphasis added).

Consistent with the court's mandate in *Concrete Works II,* the City attempted to show at trial that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business." *Id.* The City can demonstrate that it is a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by compiling evidence of

marketplace discrimination and then linking its spending practices to the private discrimination. *Id.*, quoting *Croson,* 488 U.S. at 492.

The court rejected CWC's argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII,* the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination." *Id.* at 977, quoting *Adarand VII,* 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City's showing that it indirectly participates in industry discrimination. *Id.* at 977.

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that "despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial." *Id.* at 977-78. In *Adarand VII,* the court concluded that this study, among other evidence, "strongly support[ed] an initial showing of discrimination in lending." *Id.* at 978, quoting, *Adarand VII,* 228 F.3d at 1170, n. 13 ("Lending discrimination alone of course does not justify action in the construction market. However, the persistence of such discrimination ... supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded."). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant. The court rejected the district court criticism of the evidence because it failed to determine whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The court concluded that discriminatory motive can be inferred from the results shown in disparity studies. The court held the district court's criticism did not undermine the study's reliability as an indicator that the City is passively participating in marketplace discrimination. The court noted that in *Adarand VII* it took "judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects." *Id.* at 978, quoting *Adarand VII,* 228 F.3d at 1170.

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than

the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, *supra,* the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id.* at 978.

The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII.* "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion." *Id.* at 979, quoting *Adarand VII,*228 F.3d at 1174.

In sum, the court held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary. *Id.* at 979-80.

Variables. CWC challenged Denver's disparity studies as unreliable because the disparities shown in the studies may be attributable to firm size and experience rather than discrimination. Denver countered, however, that a firm's size has little effect on its qualifications or its ability to provide construction services and that MBE/WBEs, like all construction firms, can perform most services either by hiring additional employees or by employing subcontractors. CWC responded that elasticity itself is relative to size and experience; MBE/WBEs are less capable of expanding because they are smaller and less experienced. *Id.* at 980.

The court concluded that even if it assumed that MBE/WBEs are less able to expand because of their smaller size and more limited experience, CWC did not respond to Denver's argument and the evidence it presented showing that experience and size are not race- and gender-neutral variables and that MBE/WBE construction firms are generally smaller and less experienced *because* of industry discrimination. *Id.* at 981. The lending discrimination and business formation studies, according to the court, both strongly supported Denver's argument that MBE/WBEs are smaller and less experienced because of marketplace and industry discrimination. In addition, Denver's expert testified that discrimination by banks or bonding companies would reduce a firm's revenue and the number of employees it could hire. *Id.*

Denver also argued its Studies controlled for size and the 1995 Study controlled for experience. It asserted that the 1990 Study measured revenues per employee for construction for MBE/WBEs and concluded that the resulting disparities, "suggest[ ] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of non-minority male-owned firms." *Id.* at 982. Similarly, the 1995 Study controlled for size, calculating,

inter alia, disparity indices for firms with no paid employees which presumably are the same size.

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver's disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City's position that a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in Denver's studies would decrease or disappear if the studies controlled for size and experience to CWC's satisfaction. Consequently, the court held CWC's rebuttal evidence was insufficient to meet its burden of discrediting Denver's disparity studies on the issue of size and experience. *Id.* at 982.

Specialization. The district court also faulted Denver's disparity studies because they did not control for firm specialization. The court noted the district court's criticism would be appropriate only if there was evidence that MBE/WBEs are more likely to specialize in certain construction fields. *Id.* at 982.

The court found there was no identified evidence showing that certain construction specializations require skills less likely to be possessed by MBE/WBEs. The court found relevant the testimony of the City's expert, that the data he reviewed showed that MBEs were represented "widely across the different [construction] specializations." *Id.* at 982-83. There was no contrary testimony that aggregation bias caused the disparities shown in Denver's studies. *Id.* at 983.

The court held that CWC failed to demonstrate that the disparities shown in Denver's studies are eliminated when there is control for firm specialization. In contrast, one of the Denver studies, which controlled for SIC-code subspecialty and still showed disparities, provided support for Denver's argument that firm specialization does not explain the disparities. *Id.* at 983.

The court pointed out that disparity studies may make assumptions about availability as long as the same assumptions can be made for all firms. *Id.* at 983.

Utilization of MBE/WBEs on City projects. CWC argued that Denver could not demonstrate a compelling interest because it overutilized MBE/WBEs on City construction projects. This argument, according to the court, was an extension of CWC's argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the court concluded that Denver could satisfy its burden by showing that it is an indirect participant in industry discrimination, CWC's argument relating to the utilization of MBE/WBEs on City projects goes only to the weight of Denver's evidence. *Id.* at 984.

Consistent with the court's mandate in *Concrete Works II,* at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program and "reflect[ed] the intended remedial effect on MBE and WBE utilization." *Id.* at 984, quoting *Concrete Works II,* 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. *Id.* at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id.* at 985.

The court rejected CWC's argument that the marketplace data were irrelevant but agreed that the non-goals data were also relevant to Denver's burden. The court noted that Denver did not rely heavily on the non-goals data at trial but focused primarily on the marketplace studies to support its burden. *Id.* at 985.

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver's position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

Anecdotal evidence. The anecdotal evidence, according to the court, included several incidents involving profoundly disturbing behavior on the part of lenders, majority-owned firms, and individual employees. *Id.* at 989. The court found that the anecdotal testimony revealed behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm. While CWC also argued that all new or small contractors have difficulty obtaining credit and that treatment the witnesses characterized as discriminatory is experienced by all contractors, Denver's witnesses specifically testified that they believed the incidents they experienced were motivated by race or gender discrimination. The court found they supported those beliefs with testimony that majority-owned firms were not subject to the same requirements imposed on them. *Id.*

The court held there was no merit to CWC's argument that the witnesses' accounts must be verified to provide support for Denver's burden. The court stated that anecdotal evidence is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions. *Id.*

After considering Denver's anecdotal evidence, the district court found that the evidence "shows that race, ethnicity and gender affect the construction industry and those who work in it" and that the egregious mistreatment of minority and women employees "had direct financial consequences" on construction firms. *Id.* at 989, quoting *Concrete Works III,* 86 F. Supp.2d at 1074, 1073. Based on the district court's findings regarding Denver's anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, unrebutted support for Denver's initial burden. *Id.* at 989-90, *citing Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a

pattern or practice discrimination case was persuasive because it "brought the cold [statistics] convincingly to life").

Summary. The court held the record contained extensive evidence supporting Denver's position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. *Id.* at 990. The information available to Denver and upon which the ordinances were predicated, according to the court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.

To rebut Denver's evidence, the court stated CWC was required to "establish that Denver's evidence did not constitute strong evidence of such discrimination." *Id.* at 991, quoting *Concrete Works II,* 36 F.3d at 1523. CWC could not meet its burden of proof through conjecture and unsupported criticisms of Denver's evidence. Rather, it must present "credible, particularized evidence." *Id.*, quoting *Adarand VII,* 228 F.3d at 1175. The court held that CWC did not meet its burden. CWC *hypothesized* that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, the court found it did not conduct its own marketplace disparity study controlling for the disputed variables and presented no other evidence from which the court could conclude that such variables explain the disparities. *Id.* at 991-92.

Narrow tailoring. Having concluded that Denver demonstrated a compelling interest in the race-based measures and an important governmental interest in the gender-based measures, the court held it must examine whether the ordinances were narrowly tailored to serve the compelling interest and are substantially related to the achievement of the important governmental interest. *Id.* at 992.

The court stated it had previously concluded in its earlier decisions that Denver's program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II.* The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found Concrete Works did not challenge the district court's conclusion with respect to the second prong of *Croson's* strict scrutiny standard — *i.e.*, that the Ordinance is narrowly tailored to remedy past and present discrimination — the court held it need not address this issue. *Id.* at 992, *citing Concrete Works II,* 36 F.3d at 1531, n. 24.

The court concluded that the district court lacked authority to address the narrow tailoring issue on remand because none of the exceptions to the law of the case doctrine are applicable. The district court's earlier determination that Denver's affirmative-action measures were narrowly tailored is law of the case and binding on the parties.

5. *In re City of Memphis*, 293 F.3d 345 (6th Cir. 2002)

This case is instructive to the disparity study in particular based on its holding that a local government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. The United States Court of Appeals for Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. The Sixth

Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in advance of its passage. The district court had ruled that the City could not introduce the post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue.

6. *Associated Gen. Contractors v. Drabik*, 214 F.3d 730 (6th Cir. 2000), affirming Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998)

This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a "set-aside" contract based on the State of Ohio's MBE program with the award of construction contracts. The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data were insufficient and too outdated. The court held the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court held, among other things, the statute failed the narrow tailoring test because there was no evidence that the State had considered race-neutral remedies.

The court was mindful of the fact that it was striking down an entire class of programs by declaring the State of Ohio MBE statute in question unconstitutional, and noted that its decision was "not reconcilable" with the Ohio Supreme Court's decision in *Ritchie Produce*, 707 N.E.2d 871 (Ohio 1999) (upholding the Ohio State MBE Program).

7. *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999)

This case is instructive to the disparity study because the decision highlights the evidentiary burden imposed by the courts necessary to support a local MBE/WBE program. In addition, the Fifth Circuit permitted the aggrieved contractor to recover lost profits from the City of Jackson, Mississippi due to the City's enforcement of the MBE/WBE program that the court held was unconstitutional.

The Fifth Circuit, applying strict scrutiny, held that the City of Jackson, Mississippi failed to establish a compelling governmental interest to justify its policy placing 15 percent minority participation goals for City construction contracts. In addition, the court held the evidence upon which the City relied was faulty for several reasons, including because it was restricted to the letting of prime contracts by the City under the City's Program, and it did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool in the City's construction projects. Significantly, the court also held that the plaintiff in this case could recover lost profits against the City as damages as a result of being denied a bid award based on the application of the MBE/WBE program.

8. *Eng'g Contractors Ass'n of S. Florida v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997)

Engineering Contractors Association of South Florida v. Metropolitan Engineering Contractors Association is a paramount case in the Eleventh Circuit and is instructive to the disparity study. This decision has been cited and applied by the courts in various circuits that have addressed MBE/WBE-type programs or legislation involving local government contracting and procurement.

In *Engineering Contractors Association*, six trade organizations (the "plaintiffs") filed suit in the district court for the Southern District of Florida, challenging three affirmative action programs administered by Engineering Contractors Association, Florida, (the "County") as violative of the Equal Protection Clause. 122 F.3d 895, 900 (11th Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program ("BBE"), the Hispanic Business Enterprise program ("HBE"), and the Woman Business Enterprise program, ("WBE"), (collectively "MWBE" programs). *Id.* The plaintiffs challenged the application of the program to County construction contracts. *Id.*

For certain classes of construction contracts valued over $25,000, the County set participation goals of 15 percent for BBEs, 19 percent for HBEs, and 11 percent for WBEs. *Id.* at 901. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County Commission would make the final determination and its decision was appealable to the County Manager. *Id.* The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. *Id.*

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite "strong basis in evidence" to support the race- and ethnicity-conscious measures. *Id.* at 902. The district court applied intermediate scrutiny to the WBE program and found that the "County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference." *Id.* Therefore, the County had failed to demonstrate a "compelling interest" necessary to support the BBE and HBE programs, and failed to demonstrate an "important interest" necessary to support the WBE program. *Id.* The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. *Id.* The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. *Id.* at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];

2. Whether the district court erred in finding the County lacked a "strong basis in evidence" to justify the existence of the BBE and HBE programs;
3. Whether the district court erred in finding the County lacked a "sufficient probative basis in evidence" to justify the existence of the WBE program; and
4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve.

Id. at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id.* at 906. Under this standard, "an affirmative action program must be based upon a 'compelling government interest' and must be 'narrowly tailored' to achieve that interest." *Id.* The Eleventh Circuit further noted:

> In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government's interest, but rather the adequacy of the evidence of discrimination offered to show that interest.

Id. (internal citations omitted).

Therefore, strict scrutiny requires a finding of a "'strong basis in evidence' to support the conclusion that remedial action is necessary." *Id., citing Croson*, 488 U.S. at 500). The requisite "'strong basis in evidence' cannot rest on 'an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.'" *Id.* at 907, *citing Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994) (citing and applying *Croson*)). However, the Eleventh Circuit found that a governmental entity can "justify affirmative action by demonstrating 'gross statistical disparities' between the proportion of minorities hired ... and the proportion of minorities willing and able to do the work ... Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence." *Id.* (internal citations omitted).

Notwithstanding the "exceedingly persuasive justification" language utilized by the Supreme Court in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. *Id.* at 908. Under this standard, the government must provide "sufficient probative evidence" of discrimination, which is a lesser standard than the "strong basis in evidence" under strict scrutiny. *Id.* at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical "anecdotal" evidence. *Id.* at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially "post-enactment" evidence (*i.e.*, evidence based on data related to years following the initial enactment of the BBE program). *Id.* However, "such evidence carries with it the hazard

that the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market." *Id.* at 912. A district court should not "speculate about what the data *might* have shown had the BBE program never been enacted." *Id.*

The statistical evidence. The County presented five basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. *Id.* In summary, the Eleventh Circuit held that the County's statistical evidence (described more fully below) was subject to more than one interpretation. *Id.* at 924. The district court found that the evidence was "insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was insufficiently probative to support the County's stated rationale for imposing a gender preference." *Id.* The district court's view of the evidence was a permissible one. *Id.*

County contracting statistics. The County presented a study comparing three factors for County non-procurement construction contracts over two time periods (1981-1991 and 1993): (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. *Id.* at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no "consistently negative disparities between the bidder and awardee percentages. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate 'share' ... when the bidder percentages are used as the baseline." *Id.* at 913. For the WBE statistics, the bidder/awardee statistics were "decidedly mixed" as across the range of County construction contracts. *Id.*

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MBE/WBEs, by calculating "disparity indices" for each program and classification of construction contract. The Eleventh Circuit explained:

> [A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group's bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group's contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent.

Id. at 914. "The utility of disparity indices or similar measures ... has been recognized by a number of federal circuit courts." *Id.*

The Eleventh Circuit found that "[i]n general ... disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination." *Id.* The Eleventh Circuit noted that "the EEOC's disparate impact guidelines use the 80 percent test as the boundary line for determining a *prima facie* case of discrimination." *Id., citing* 29 C.F.R. § 1607.4D. In addition, no circuit that has "explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination." *Id., citing*

Concrete Works v. City & County of Denver, 36 F.3d 1513, 1524 (10th Cir. 1994) (crediting disparity indices ranging from 0 percent to 3.8 percent); *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4 percent).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. *Id.* at 914. "The standard deviation figure describes the probability that the measured disparity is the result of mere chance." *Id.* The Eleventh Circuit had previously recognized "[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance." *Id.*

The statistics presented by the County indicated "statistically significant underutilization of BBEs in County construction contracting." *Id.* at 916. The results were "less dramatic" for HBEs and mixed as between favorable and unfavorable for WBEs. *Id.*

The Eleventh Circuit then explained the burden of proof:

> [O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored.'

Id. (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three methods to rebut the inference of discrimination with a "neutral explanation" by: "(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data." *Id.* (internal quotations and citations omitted). The Eleventh Circuit held that the plaintiffs produced "sufficient evidence to establish a neutral explanation for the disparities." *Id.*

The plaintiffs alleged that the disparities were "better explained by firm size than by discrimination ... [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts." *Id.* at 916-17. The plaintiffs produced Census data indicating, on average, minority- and female-owned construction firms in Engineering Contractors Association were smaller than non-MBE/WBE firms. *Id.* at 917. The Eleventh Circuit found that the plaintiff's explanation of the disparities was a "plausible one, in light of the uncontroverted evidence that MBE/WBE construction firms tend to be substantially smaller than non-MBE/WBE firms." *Id.*

Additionally, the Eleventh Circuit noted that the County's own expert admitted that "firm size plays a significant role in determining which firms win contracts." *Id.* The expert stated:

> The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it. *Id.*

The Eleventh Circuit then summarized:

> Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. *Id.*

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id.* A regression analysis is "a statistical procedure for determining the relationship between a dependent and independent variable, *e.g.*, the dollar value of a contract award and firm size." *Id.* (internal citations omitted). The purpose of the regression analysis is "to determine whether the relationship between the two variables is statistically meaningful." *Id.*

The County's regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id.* The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. *Id.* The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (*i.e.*, most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id.*

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id.* at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite "strong basis in evidence" of discrimination of BBEs and HBEs. *Id.* The Eleventh Circuit held that this decision was not clearly erroneous. *Id.*

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. *Id.*

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods failed to explain the unfavorable disparity for another type of contract during that same time period. *Id.* However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. *Id.*

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract in the 1993 period. *Id.* The regression analysis

explained all of the other negative disparities, and in the 1993 period, a disparity for one type of contract was actually favorable to WBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this evidence was not "sufficiently probative of discrimination." *Id.*

The County argued that the district court erroneously relied on the disaggregated data (*i.e.*, broken down by contract type) as opposed to the consolidated statistics. *Id.* at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) "the County's own expert testified as to the utility of examining the disaggregated data 'insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another." *Id.*

Additionally, the district court noted, and the Eleventh Circuit found that "the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as 'Simpson's Paradox,' which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated." *Id.* at 919, n. 4 (internal citations omitted). "Under those circumstances," the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a "strong basis in evidence" of discrimination, or in finding that the disaggregated data formed an insufficient basis of support for any of the MBE/WBE programs given the applicable constitutional requirements. *Id.* at 919.

County subcontracting statistics. The County performed a subcontracting study to measure MBE/WBE participation in the County's subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), "the study compared the proportion of the designated group that filed a subcontractor's release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period." *Id.*

The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. *Id.* at 920.

> Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor's release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of its business outside of Dade County filed a single subcontractor's release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation.

Id. The County's argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court's decision to fail to credit the study erroneous. *Id.*

Marketplace data statistics. The County conducted another statistical study "to see what the differences are in the marketplace and what the relationships are in the marketplace." *Id.* The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a "certificate of competency" with Dade County as of January 1995. *Id.* The selected firms participated in a telephone survey inquiring about the race, ethnicity, and gender of the firm's owner, and asked for information on the firm's total sales and receipts from all sources. *Id.* The County's expert then studied the data to determine "whether meaningful relationships existed between (1) the race, ethnicity, and gender of the surveyed firm owners, and (2) the reported sales and receipts of that firm. *Id.* The expert's hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. *Id.*

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id.* Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id.* at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, quoting *Croson*, 488 U.S. at 501, quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. *Id.* Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed *supra*. *Id.*

The Wainwright Study. The County also introduced a statistical analysis prepared by Jon Wainwright, analyzing "the personal and financial characteristics of self-employed persons working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database" (derived from the decennial census). *Id.* The study "(1) compared construction business ownership rates of MBE/WBEs to those of non-MBE/WBEs, and (2) analyzed disparities in personal income between MBE/WBE and non-MBE/WBE business owners." *Id.* "The study concluded that blacks, Hispanics, and women are less likely to own construction businesses than similarly situated white males, and MBE/WBEs that do enter the construction business earn less money than similarly situated white males." *Id.*

With respect to the first conclusion, Wainwright controlled for "human capital" variables (education, years of labor market experience, marital status, and English proficiency) and "financial capital" variables (interest and dividend income, and home ownership). *Id.* The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. *Id.* The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. *Id.* at 922. The underlying theory of this business ownership component

of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. *Id.*

The Eleventh Circuit held, in light of *Croson*, the district court need not have accepted this theory. *Id.* The Eleventh Circuit quoted *Croson*, in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: "There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities *as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.*" *Id.*, quoting *Croson*, 488 U.S. at 503. Following the Supreme Court in *Croson*, the Eleventh Circuit held "the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason." *Id.*, quoting *Croson*, 488 U.S. at 503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MBE/WBE firms as opposed to non-MBE/WBE firms, which would further negate the proposition that the construction industry was discriminating against minority- and woman-owned firms. *Id.* at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. *Id.* at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed supra, which did regress for firm size. *Id.*

The Brimmer Study. The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. *Id.* The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau's Survey of Minority- and Woman-owned Businesses, produced every five years. *Id.* The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. *Id.*

The study indicated substantial disparities in 1977 and 1987 but not 1982. *Id.* The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. *Id.* However, the study made no attempt to filter for the Metrorail project and "complete[ly] fail[ed]" to account for firm size. *Id.* Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. *Id.* at 924.

Anecdotal evidence. In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBEs, a small amount of similar anecdotal evidence pertaining to WBEs, and no anecdotal evidence pertaining to HBEs. *Id.* The County presented three basic forms of anecdotal evidence: "(1) the testimony of two County employees responsible for administering the MBE/WBE programs; (2) the testimony, primarily by affidavit, of twenty-three MBE/WBE contractors and subcontractors; and (3) a survey of black-owned construction firms." *Id.*

The County employees testified that the decentralized structure of the County construction contracting system affords great discretion to County employees, which in turn creates the opportunity for discrimination to infect the system. *Id.* They also testified to specific incidents of discrimination, for example, that MBE/WBEs complained of receiving lengthier punch lists than their non-MBE/WBE counterparts. *Id.* They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. *Id.*

The MBE/WBE contractors and subcontractors testified to numerous incidents of perceived discrimination in the Dade County construction market, including:

> Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was "shopped" to solicit even lower bids from non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a "letter of unavailability" for the MWBE owner to sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project.

Id. at 924-25.

Finally, the County submitted a study prepared by Dr. Joe E. Feagin, comprised of interviews of 78 certified black-owned construction firms. *Id.* at 925. The interviewees reported similar instances of perceived discrimination, including: "difficulty in securing bonding and financing; slow payment by general contractors; unfair performance evaluations that were tainted by racial stereotypes; difficulty in obtaining information from the County on contracting processes; and higher prices on equipment and supplies than were being charged to non-MBE/WBE firms." *Id.*

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County's construction contracting process. *Id.* However, such anecdotal evidence is helpful "only when it [is] combined with and reinforced by sufficiently probative statistical evidence." *Id.* In her plurality opinion in *Croson*, Justice O'Connor found that "evidence of a pattern of individual discriminatory acts can, *if supported by appropriate statistical proof*, lend support to a local government's determination that broader remedial relief is justified." *Id.*, quoting *Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that "anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id.* at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id.* at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a "constitutionally sufficient evidentiary foundation." *Id.*

Although the Eleventh Circuit determined that the MBE/WBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MBE/WBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, *i.e.*, "remedying the effects of present and past discrimination against blacks, Hispanics, and women in the Dade County construction market." *Id.*

Narrow tailoring. "The essence of the 'narrowly tailored' inquiry is the notion that explicitly racial preferences ... must only be a 'last resort' option." *Id.*, quoting *Hayes v. North Side Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993) and *citing Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he strict scrutiny standard ... forbids the use of even narrowly drawn racial classifications except as a last resort.").

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) "the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties." *Id.* at 927, *citing Ensley Branch*, 31 F.3d at 1569. The four factors provide "a useful analytical structure." *Id.* at 927. The Eleventh Circuit focused only on the first factor in the present case "because that is where the County's MBE/WBE programs are most problematic." *Id.*

The Eleventh Circuit

> flatly reject[ed] the County's assertion that 'given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.' That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id.*, *citing Croson*, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting") ... Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment.

Id. at 927.

The Eleventh Circuit held that the County "clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures." *Id.* Rather, the determination of the necessity to establish the MWBE programs was based upon a conclusory legislative statement as to its necessity, which in turn was based upon an "equally conclusory analysis" in the Brimmer study, and a report that the SBA only was able to direct 5 percent of SBA financing to black-owned businesses between 1968-1980. *Id.*

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. *Id.* at 928. Moreover, the Eleventh Circuit found that the testimony of the County's own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. *Id.* The County employees identified problems, virtually all of which were related to the County's own processes and procedures, including: "the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information." *Id.* The Eleventh Circuit found that the problems facing MBE/WBE contractors were "institutional barriers" to entry facing every new entrant into the construction market, and were perhaps affecting the MBE/WBE contractors disproportionately due to the "institutional youth" of black- and Hispanic-owned construction firms. *Id.* "It follows that those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part." *Id.*

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O'Connor in *Croson*:

> [T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect ... The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks.

Id., quoting *Croson*, 488 U.S. at 509-10. The Eleventh Circuit found that except for some "half-hearted programs" consisting of "limited technical and financial aid that might benefit BBEs and HBEs," the County had not "seriously considered" or tried most of the race- and ethnicity-neutral alternatives available. *Id.* at 928. "Most notably ... the County has not taken any action whatsoever to ferret out and respond to instances of discrimination if and when they have occurred in the County's own contracting process." *Id.*

The Eleventh Circuit found that the County had taken no steps to "inform, educate, discipline, or penalize" discriminatory misconduct by its own employees. *Id.* at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. *Id.* "Instead of turning to race- and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort." Accordingly, the Eleventh Circuit held that even if the BBE and HBE programs were supported by the requisite evidentiary foundation, they violated the Equal Protection Clause because they were not narrowly tailored. *Id.*

Substantial relationship. The Eleventh Circuit held that due to the relaxed "substantial relationship" standard for gender-conscious programs, if the WBE program rested upon a sufficient evidentiary foundation, it could pass the substantial relationship requirement. *Id.*

However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. *Id.*

For all of the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MBE/WBE programs unconstitutional and enjoining their continued operation.

9. *Monterey Mechanical v. Wilson*, 125 F.3d 702 (9th Cir. 1997)

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of a MBE/WBE-type program. Although the program at issue utilized the term "goals" as opposed to "quotas," the Ninth Circuit rejected such a distinction, holding "[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." The case also is instructive because it found the use of "goals" and the application of "good faith efforts" in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the "plaintiff") submitted the low bid for a construction project for the California Polytechnic State University (the "University"). 125 F.3d 702, 704 (9th Cir. 1994). The University rejected the plaintiff's bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id.* The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id.*

Importantly, the University did not conduct a disparity study, and instead argued that because "the 'goal requirements' of the scheme '[did] not involve racial or gender quotas, set-asides or preferences,'" the University did not need a disparity study. *Id.* at 705. The plaintiff protested the contract award and sued the University's trustees, and a number of other individuals (collectively the "defendants") alleging the state law was violative of the Equal Protection Clause. *Id.* The district court denied the plaintiff's motion for an interlocutory injunction and the plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The defendants first argued that the statute was constitutional because it treated all general contractors alike, by requiring all to comply with the MBE/WBE participation goals. *Id.* at 708. The court held, however, that a minority or women business enterprise could satisfy the participation goals by allocating the requisite percentage of work to itself. *Id.* at 709. The court held that contrary to the district court's finding, such a difference was not *de minimis*. *Id.*

The defendant's also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id.* at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, "they are rigid in requiring precisely described and monitored efforts to attain those goals." *Id.* The court cited its own earlier precedent to hold that "the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas ... [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." *Id.* at 710-11 (internal citations and quotations omitted). The court found that the statute encouraged set asides and cited *Concrete*

Works of Colorado v. Denver, 36 F.3d 1512 (10th Cir. 1994), as analogous support for the proposition. *Id.* at 711.

The court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although "worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness." *Id.* The court also noted that the statute may impose additional compliance expenses upon non-MBE/WBE firms who are required to make good faith outreach efforts (*e.g.*, advertising) to MBE/WBE firms. *Id.* at 712.

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id.* at 712-13. The court found the University presented "no evidence" to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id.* at 713. The court found that the statute was not narrowly tailored because the definition of "minority" was overbroad (*e.g.*, inclusion of Aleuts). *Id.* at 714, *citing Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). The court found "[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny." *Id.* at 714, *citing Hopwood v. State of Texas*, 78 F.3d 932, 951 (5th Cir. 1996). The court held that the statute violated the Equal Protection Clause.

10. *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity ("AGCC")*, 950 F.2d 1401 (9th Cir. 1991)

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity ("AGCC")*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin enforcement of the city's bid preference program. 950 F.2d 1401 (9th Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the 5 percent preference given Local Business Enterprises ("LBEs") and the 5 percent preference given MBEs and WBEs. *Id.* The ordinance defined "MBE" as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. "WBE" was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed $14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC's constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interesting in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities' legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, "the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review." *Id.* at 1413, quoting *Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." *Id.* at 1413 quoting *Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the "relevant market," the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated than in its decision in *Coral Construction*, it emphasized that such statistical disparities are "an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, citing to *Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring "the cold numbers convincingly to life. *Id.* at 1414, quoting *Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id* at 1415. The City pointed to numerous

individual accounts of discrimination, that an "old boy network" still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a "combination of convincing anecdotal and statistical evidence is potent." *Id.* at 1415 quoting *Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City's findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the "narrowly tailored" requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of "rigid numerical quotas." *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id.* Third, "an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 quoting *Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that "while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative may be." *Id.* at 1417 quoting *Coral Construction*, 941 F2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage

of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy "superfluous," and would thwart the Supreme Court's directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear "relatively light and well distributed." *Id.* at 1417. The court stated that the Ordinance was "limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, quoting *Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City's borders. *Id.* 1418.

11. *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991)

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington's minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County's MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a *prima facie* case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where "gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern or practice of discrimination." *Id.* at 918, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics "convincingly to life." *Id.* at 919, quoting *International Brotherhood of Teamsters v. United States*, 431 U.S 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, *citing Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a "propelling government interest" for King County's adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, *citing Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the

program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, *citing Croson*, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at 5 percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or support services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id.*

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* The actual percentages of required MBE

participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id.*

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of "minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. *Id.* Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

In this case, the court concluded, that King County's WBE preference survived a facial challenge. *Id.* at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id.* The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id.* at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

Recent District Court Decisions

12. *H.B. Rowe Corp., Inc. v. W. Lyndo Tippett, North Carolina DOT, et al.*, 589 F. Supp.2d 587 (E.D.N.C. 2008), affirmed in part, reversed in part, and remanded, 615 F.3d 233 (4th Cir. 2010)

In *H.B. Rowe Company v. Tippett, North Carolina Department of Transportation, et al.* ("*Rowe*"), the United States District Court for the Eastern District of North Carolina, Western Division,

heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina "affirmative action" program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

Background. In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff's bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate "good faith efforts" to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff's bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff's good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT's MWBE Program "largely mirrors" the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT's MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id.* An individual target for MBE participation was set for each project. *Id.*

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id.* The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippett. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages

award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program.

Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

December 9, 2008 Order of the District Court (589 F.Supp.2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

North Carolina's MWBE program. The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, et seq. The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of

work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C .Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT "dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of 'good faith' attempts to do so." 589 F.Supp.2d 587.

Compelling interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina's road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program's suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of

MBEs. The court held that the NCDOT established that, "based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination." 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, quoting *Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to "those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department." § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F3d 233 (4th Cir. 2010), discussed above.

13. *Thomas v. City of Saint Paul*, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009).

In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly-funded contracts. The City moved for summary judgment, which the United States District Court granted and issued an order dismissing the plaintiff's lawsuit in December 2007.

The background of the case involves the adoption by the City of Saint Paul of a Vendor Outreach Program ("VOP") that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City contracts for publicly-funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp.2d at 962. The City contended that Thomas was provided opportunities to bid for the City's work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. *Id.* Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id.* The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id.* at 963. Plaintiff Newell claimed he submitted numerous bids on the City's projects all of which were rejected. *Id.* The court found, however, that he provided no specifics about why he did not receive the work. *Id.*

The VOP. Under the VOP, the City sets annual bench marks or levels of participation for the targeted minorities groups. *Id.* at 963. The VOP prohibits quotas and imposes various "good faith" requirements on prime contractors who bid for City projects. *Id.* at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. *Id.* The VOP further imposes obligations on the City with respect to vendor contracts. *Id.* The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. *Id.* The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance

required to perform under the contract. *Id.* The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id.*

Analysis and Order of the Court. The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id.* at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id.* The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id.* at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id.* at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id.* at 966. The court held the law does not require the City to voluntarily adopt "aggressive race-based affirmative action programs" in order to award specific groups publicly-funded contracts. *Id.* at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id.*

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id.* at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day's notice to enter a bid, such a failure is not, per se, illegal. *Id.* The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id.*

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. *Id.* Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id.* at 966.

Plaintiff's claims. The court found that even assuming plaintiffs possessed standing, they failed to establish facts which demonstrated a need for a trial, primarily because each theory of recovery is viable only if the City "intentionally" treated plaintiffs unfavorably because of their race. *Id.* at 967. The court held to establish a *prima facie* violation of the equal protection clause, there must be state action. *Id.* Plaintiffs must offer facts and evidence that constitute proof of "racially discriminatory intent or purpose." *Id.* at 967. Here, the court found that plaintiff failed to allege any single instance showing the City "intentionally" rejected VOP bids based on their race. *Id.*

The court also found that plaintiffs offered no evidence of a specific time when any one of them submitted the lowest bid for a contract or a subcontract, or showed any case where their bids were rejected on the basis of race. *Id.* The court held the alleged failure to place minority contractors in a preferred position, without more, is insufficient to support a finding that the City failed to treat them equally based upon their race. *Id.*

The City rejected the plaintiff's claims of discrimination because the plaintiffs did not establish by evidence that the City "intentionally" rejected their bid due to race or that the City "intentionally" discriminated against these plaintiffs. *Id.* at 967-968. The court held that the plaintiffs did not establish a single instance showing the City deprived them of their rights, and the plaintiffs did not produce evidence of a "discriminatory motive." *Id.* at 968. The court concluded that plaintiffs had failed to show that the City's actions were "racially motivated." *Id.*

The Eighth Circuit Court of Appeals affirmed the ruling of the district court. *Thomas v. City of Saint Paul,* 2009 WL 777932 (8th Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

14. *Thompson Building Wrecking Co. v. Augusta, Georgia*, No. 1:07CV019, 2007 WL 926153 (S.D. Ga. Mar. 14, 2007)(Slip. Op.)

This case considered the validity of the City of Augusta's local minority DBE program. The district court enjoined the City from favoring any contract bid on the basis of racial classification and based its decision principally upon the outdated and insufficient data proffered by the City in support of its program. 2007 WL 926153 at *9-10.

The City of Augusta enacted a local DBE program based upon the results of a disparity study completed in 1994. The disparity study examined the disparity in socioeconomic status among races, compared black-owned businesses in Augusta with those in other regions and those owned by other racial groups, examined "Georgia's racist history" in contracting and procurement, and examined certain data related to Augusta's contracting and procurement. *Id.* at *1-4. The plaintiff contractors and subcontractors challenged the constitutionality of the DBE program and sought to extend a temporary injunction enjoining the City's implementation of racial preferences in public bidding and procurement.

The City defended the DBE program arguing that it did not utilize racial classifications because it only required vendors to make a "good faith effort" to ensure DBE participation. *Id.* at *6. The court rejected this argument noting that bidders were required to submit a "Proposed DBE Participation" form and that bids containing DBE participation were treated more favorably than those bids without DBE participation. The court stated: "Because a person's business can qualify for the favorable treatment based on that person's race, while a similarly situated person of another race would not qualify, the program contains a racial classification." *Id.*

The court noted that the DBE program harmed subcontractors in two ways: first, because prime contractors will discriminate between DBE and non-DBE subcontractors and a bid with a DBE subcontractor would be treated more favorably; and second, because the City would favor a bid containing DBE participation over an equal or even superior bid containing no DBE participation. *Id.*

The court applied the strict scrutiny standard set forth in *Croson* and *Engineering Contractors Association* to determine whether the City had a compelling interest for its program and whether the program was narrowly tailored to that end. The court noted that pursuant to *Croson*, the City would have a compelling interest in assuring that tax dollars would not perpetuate private prejudice. But, the court found (citing to *Croson*), that a state or local government must identify that discrimination, "public or private, with some specificity before they may use race-conscious

relief." The court cited the Eleventh Circuit's position that "'gross statistical disparities' between the proportion of minorities hired by the public employer and the proportion of minorities willing and able to work" may justify an affirmative action program. *Id.* at *7. The court also stated that anecdotal evidence is relevant to the analysis.

The court determined that while the City's disparity study showed some statistical disparities buttressed by anecdotal evidence, the study suffered from multiple issues. *Id.* at *7-8. Specifically, the court found that those portions of the study examining discrimination outside the area of subcontracting (*e.g.*, socioeconomic status of racial groups in the Augusta area) were irrelevant for purposes of showing a compelling interest. The court also cited the failure of the study to differentiate between different minority races as well as the improper aggregation of race- and gender-based discrimination referred to as Simpson's Paradox.

The court assumed for purposes of its analysis that the City could show a compelling interest but concluded that the program was not narrowly tailored and thus could not satisfy strict scrutiny. The court found that it need look no further beyond the fact of the 13-year duration of the program absent further investigation, and the absence of a sunset or expiration provision, to conclude that the DBE program was not narrowly tailored. *Id.* at *8. Noting that affirmative action is permitted only sparingly, the court found: "[i]t would be impossible for Augusta to argue that, 13 years after last studying the issue, racial discrimination is so rampant in the Augusta contracting industry that the City must affirmatively act to avoid being complicit." *Id.* The court held in conclusion, that the plaintiffs were "substantially likely to succeed in proving that, when the City requests bids with minority participation and in fact favors bids with such, the plaintiffs will suffer racial discrimination in violation of the Equal Protection Clause." *Id.* at *9.

In a subsequent Order dated September 5, 2007, the court denied the City's motion to continue plaintiff's Motion for Summary Judgment, denied the City's Rule 12(b)(6) motion to dismiss, and stayed the action for 30 days pending mediation between the parties. Importantly, in this Order, the court reiterated that the female- and locally-owned business components of the program (challenged in plaintiff's Motion for Summary Judgment) would be subject to intermediate scrutiny and rational basis scrutiny, respectively. The court also reiterated its rejection of the City's challenge to the plaintiffs' standing. The court noted that under *Adarand*, preventing a contractor from competing on an equal footing satisfies the particularized injury prong of standing. And showing that the contractor will sometime in the future bid on a City contract "that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors" satisfies the second requirement that the particularized injury be actual or imminent. Accordingly, the court concluded that the plaintiffs have standing to pursue this action.

15. *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, 333 F. Supp.2d 1305 (S.D. Fla. 2004)

The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, is significant to the disparity study because it applied and followed the *Engineering Contractors Association* decision in the context of contracting and procurement for goods and support services (including architect and engineer services). Many of the other cases focused on construction, and thus *Hershell Gill* is instructive as to the analysis relating to architect and engineering services. The

decision in *Hershell Gill* also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court's finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 .3d 950 (10th Cir. 2003). *See* discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the "plaintiffs") brought suit against Engineering Contractors Association (the "County"), the former County Manager, and various current County Commissioners (the "Commissioners") in their official and personal capacities (collectively the "defendants"), seeking to enjoin the same "participation goals" in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit's decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise ("CSBE") program for construction contracts, "but continued to apply racial, ethnic, and gender criteria to its purchases of goods and support services in other areas, including its procurement of A&E services." *Id.* at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively "MBE/WBE"). *Id.* The MBE/WBE programs applied to A&E contracts in excess of $25,000. *Id.* at 1312. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id.* Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id.* at 1313. However, the district court found "the participation goals for the three MBE/WBE programs challenged ... remained unchanged since 1994." *Id.*

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id.* at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the "County has reached parity for black, Hispanic, and Woman-owned firms in the areas of [A&E] services." The final report further stated "Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures." *Id.* at 1315. The district court also found that the Commissioners were informed that "there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers then there was in contract construction." *Id.* Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id.*

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

Id. The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id.* at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id.* at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present "a strong basis of evidence" indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id.* at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the "gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective." *Id.* at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present "sufficient probative evidence" of discrimination. *Id.* (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a "last resort." *Id.*

The County presented both statistical and anecdotal evidence. *Id.* at 1318. The statistical evidence consisted of Dr. Carvajal's report, most of which consisted of "post-enactment" evidence. *Id.* Dr. Carvajal's analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id.* The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id.* Dr. Carvajal used the phone book, a list compiled by infoUSA, and a list of firms registered for technical certification with the County's Department of Public Works to compile a list of the "universe" of firms competing in the market. *Id.* For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id.*

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id.* Dr. Carvajal conducted regression analyses "in order to determine the effect a firm owner's gender or race had on certain dependent variables." *Id.* Dr. Carvajal used the firm's annual volume of business as a dependent variable and determined the disparities were due in each case to the

firm's gender and/or ethnic classification. *Id.* at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms." *Id.* Dr. Carvajal's results remained substantially unchanged. *Id.*

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the "gross statistical disparities" in the annual business volume for Hispanic- and woman-owned firms could be attributed to discrimination; he "did not find sufficient evidence of discrimination against blacks." *Id.*

The court held that Dr. Carvajal's study constituted neither a "strong basis in evidence" of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute "sufficient probative evidence" necessary to justify the gender-conscious measures. *Id.* The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id.* The court found that an analysis of the award data indicated, "[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace." *Id.*

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id.* at 1321. With respect to the marketplace data for Hispanics and women, the court found it "unreliable and inaccurate" for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id.* at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the "Tenth Circuit's decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari." *Id.* at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County's A&E industry. *Id.* The anecdotal evidence consisted of the testimony of three A&E professional women, "nearly all" of which was related to discrimination in the award of County contracts. *Id.* at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal's study indicating that no disparity existed with respect to the award of County A&E contracts. *Id.*

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition "that only in the rare case will anecdotal evidence suffice standing alone." *Id.* (internal citations omitted). The court held that "[t]his is not one of those rare cases." The district court concluded that the statistical evidence was "unreliable and fail[ed] to establish the existence of discrimination," and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id.*

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id.* at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal's report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id.* at 1330. However, the court found that because the study failed to "identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished ... it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone." *Id.*

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id.* Instead, the Commissioners voted to continue the HBE program. *Id.* The court held that the County's failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id.* at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id.* However, "not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry," leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id.* Under either scenario, the HBE program could not be narrowly tailored. *Id.*

The court found the waiver provisions in the HBE program inflexible in practice. *Id.* Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id.* The court found this even "more problematic" because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences "must be limited in time." *Id.* at 1332, *citing Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id.* at 1332.

With respect to the WBE program, the court found that "the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination." *Id.* at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id.*

The court held that the County was liable for any compensatory damages. *Id.* at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated

"clearly established statutory or constitutional rights of which a reasonable person would have known ... Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them 'fair warning' that their actions were unconstitutional. " *Id.* at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they "had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs ... were unconstitutional: *Croson, Adarand* and [*Engineering Contractors Association*]." *Id.* at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand. Id.* Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id.* Thus, the case law was "clearly established" and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id.*

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id.* at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id.* For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs $100 each in nominal damages and reasonable attorneys' fees and costs, for which it held the County and the Commissioners jointly and severally liable.

16. *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307 (N.D. Fla. 2004)

This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors Association*. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a "race-conscious" program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The plaintiffs contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment by instituting race- and gender-conscious "preferences" in order to increase the numeric representation of "MBEs" in certain industries.

According to the court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity ("OSD") to assist MBEs to become suppliers of commodities, services and construction to the state government. The OSD had certain responsibilities, including adopting rules meant to assess

whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute's purpose. The statute provided that each State agency is "encouraged" to spend 21 percent of the monies actually expended for construction contracts, 25 percent of the monies actually expended for architectural and engineering contracts, 24 percent of the monies actually expended for commodities and 50.5 percent of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to allocate certain percentages for black Americans, Hispanic Americans and for American women, and the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

The State took the position that the spending goals were "precatory." The court found that the plaintiffs had standing to maintain the action and to pursue prospective relief. The court held that the statute was unconstitutional based on the finding that the spending goals were not narrowly tailored to achieve a governmental interest. The court did not specifically address whether the articulated reasons for the goals contained in the statute had sufficient evidence, but instead found that the articulated reason would, "if true," constitute a compelling governmental interest necessitating race-conscious remedies. Rather than explore the evidence, the court focused on the narrowly tailored requirement and held that it was not satisfied by the State.

The court found that there was no evidence in the record that the State contemplated race-neutral means to accomplish the objectives set forth in Section 287.09451 *et seq.*, such as "'simplification of bidding procedures, relaxation of bonding requirements, training or financial aid for disadvantaged entrepreneurs of all races [which] would open the public contracting market to all those who have suffered the effects of past discrimination.'" *Florida A.G.C. Council*, 303 F.Supp.2d at 1315, quoting *Eng'g Contractors Ass'n*, 122 F.3d at 928, quoting *Croson*, 488 U.S. at 509-10.

The court noted that defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in the statute. Rather, the State of Florida argued that the statute is "permissive." The court, however, held that "there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute 'induces an employer to hire with an eye toward meeting ... [a] numerical target.' *Florida A.G.C. Council*, 303 F.Supp.2d at 1316.

The court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting a MBE utilization plan. If the State agency deviated from the utilization plan in two consecutive and three out of five total fiscal years, then the OSD could review any and all solicitations and contract awards of the agency as deemed necessary until such time as the

agency met its utilization plan. The court held that based on these factors, although alleged to be "permissive," the statute textually was not.

Therefore, the court found that the statute was not narrowly tailored to serve a compelling governmental interest, and consequently violated the Equal Protection Clause of the Fourteenth Amendment.

17. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore,* 218 F. Supp.2d 749 (D. Md. 2002)

This case is instructive because the court found the Executive Order of the Mayor of the City of Baltimore was precatory in nature (creating no legal obligation or duty) and contained no enforcement mechanism or penalties for noncompliance and imposed no substantial restrictions; the Executive Order announced goals that were found to be aspirational only.

The Associated Utility Contractors of Maryland, Inc. ("AUC") sued the City of Baltimore challenging its ordinance providing for minority and woman-owned business enterprise ("MWBE") participation in city contracts. Previously, an earlier City of Baltimore MWBE program was declared unconstitutional. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000). The City adopted a new ordinance that provided for the establishment of MWBE participation goals on a contract-by-contract basis, and made several other changes from the previous MWBE program declared unconstitutional in the earlier case.

In addition, the Mayor of the City of Baltimore issued an Executive Order that announced a goal of awarding 35 percent of all City contracting dollars to MBE/WBEs. The court found this goal of 35 percent participation was aspirational only and the Executive Order contained no enforcement mechanism or penalties for noncompliance. The Executive Order also specified many "noncoercive" outreach measures to be taken by the City agencies relating to increasing participation of MBE/WBEs. These measures were found to be merely aspirational and no enforcement mechanism was provided.

The court addressed in this case only a motion to dismiss filed by the City of Baltimore arguing that the Associated Utility Contractors had no standing. The court denied the motion to dismiss holding that the association had standing to challenge the new MBE/WBE ordinance, although the court noted that it had significant issues with the AUC having representational standing because of the nature of the MBE/WBE plan and the fact the AUC did not have any of its individual members named in the suit. The court also held that the AUC was entitled to bring an as applied challenge to the Executive Order of the Mayor, but rejected it having standing to bring a facial challenge based on a finding that it imposes no requirement, creates no sanctions, and does not inflict an injury upon any member of the AUC in any concrete way. Therefore, the Executive Order did not create a "case or controversy" in connection with a facial attack. The court found the wording of the Executive Order to be precatory and imposing no substantive restrictions.

After this decision the City of Baltimore and the AUC entered into a settlement agreement and a dismissal with prejudice of the case. An order was issued by the court on October 22, 2003 dismissing the case with prejudice.

18. *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000)

The court held unconstitutional the City of Baltimore's "affirmative action" program, which had construction subcontracting "set-aside" goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

19. *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d 1232 (W.D. OK. 2001)

Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act ("MBE Act"). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id.* at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id.* at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, *citing Adarand VII*, 228 F.3d 1147, 1174.

Compelling state interest. The district court, following Adarand VII, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment's Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id.* The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a "passive participant" in a system of racial exclusion practiced by private businesses. *Id.* at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id.*

The district court stated that a "mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice." *Id.* Rather, the court held that the "benchmark for judging the adequacy of a state's factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state's conclusion that remedial action was necessary." *Id.* The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was "a passive participant" in private industry's discriminatory practices. *Id.* at 1240, citing to *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest "is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts." *Id.* at 1240. Thus, the district court found the State admitted that the MBE Act's bid preference "is not based on past discrimination," rather, it is based on a desire to "encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole." *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not "compelling" in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by Intervenors who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenors have not produced — or indeed even described — the evidence of discrimination. *Id.* at 1241. The district court found that it cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id.*

The court also found that the Intervenors' evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenors did not identify "a single qualified, minority-owned bidder who was excluded from a state contract." *Id.* The district court, thus, held that broad allegations of "systematic" exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the "State's admission here that the State's governmental interest was not in remedying past discrimination in the state competitive bidding process, but in 'encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.'" *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio's statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

Narrow tailoring. The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id.* at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 *citing Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program was racially neutral. *Id.* at 1243. The court found that the State of Oklahoma did not show any

meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state's goal prior to adoption of the minority bid preference provisions. *Id.* at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id.* at 1243, footnote 15 *citing Adarand VII.*

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, "and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act." *Id.* at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id.* at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the "goal" of 10 percent of the state's contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the 13 years since the MBE Act was implemented. *Id.* at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id.* Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to "graduate" from preference eligibility. *Id.* The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id.*

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act's duration was not tied in any way to the eradication of such discrimination. *Id.* Instead, the court found the MBE Act rests on the "questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable." *Id.* at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act's minority preference provisions lacked reasonable durational limits. *Id.* at 1245.

With regard to the factor of "numerical proportionality" between the MBE Act's aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act's 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id.* at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id.* at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id.*

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id.* at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id.* In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is "not necessarily an absolute cap" on the percentage that a remedial program might legitimately seek to achieve. *Id.* at 1246, *citing Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer "substantial evidence" that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id.* at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 1247. The district court found the MBE Act's bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id.* The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state's Central Purchasing Act with no time limitation. *Id.*

In terms of the "under- and over-inclusiveness" factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. *Id.* at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at all that the minority racial groups identified in the Act had actually suffered from discrimination. *Id.*

Second, the district court found the MBE Act's bidding preference extends to all contracts for goods and support services awarded under the State's Central Purchasing Act, without regard to whether members of the preferred minority groups had been the victims of past or present discrimination within that particular industry or trade. *Id.*

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or socially disadvantaged, or has suffered from the effects of past or present discrimination. *Id.* The court thus found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. *Id.*

The district court in conclusion found that the Oklahoma MBE Act violated the Constitution's Fifth Amendment guarantee of equal protection and granted the plaintiffs' Motion for Summary Judgment.

20. *Webster v. Fulton County*, 51 F. Supp.2d 1354 (N.D. Ga. 1999), a'ffd *per curiam* 218 F.3d 1267 (11th Cir. 2000)

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County's (the "County") minority and female business enterprise program ("M/FBE") program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, *citing Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association*, 122 F.3d 895 (11th Cir. 1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort.'" *Id.* at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id.* at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. *Id.*

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id.* at 1364. The court found that the plaintiff has at least three methods "to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data." *Id., citing Eng'g Contractors Ass'n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id.* at 1368, *citing Eng'g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County's pre-1994 disparity study (the "Brimmer-Marshall Study") and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id.* at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id.* at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id.* Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a "passive participant" in discrimination by the private sector. *Id.* The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are "exacerbating a pattern of prior discrimination that can be identified with specificity." *Id.* However, the court found that the Brimmer-Marshall Study contained no such data. *Id.*

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id.* at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id.* The court thus concluded that the County failed to present a "strong basis in evidence" of discrimination to justify the County's racial and ethnic preferences. *Id.*

The court next considered the County's post-1994 disparity study. *Id.* at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id.* The court explained:

> Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period.

Id. The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id.* at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id.* at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id.* at 1376. The court found that the data were potentially skewed due to the operation of

the M/FBE program. *Id.* Additionally, the court found that the County's standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id.* (internal citations omitted).

The court considered the County's anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that "[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id.*, quoting *Eng'g Contractors Ass'n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id.* at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id.* The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id.* The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id.*

The court also applied a narrow tailoring analysis of the M/FBE program. "The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a 'last resort.'" *Id.* at 1380, *citing Eng'g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit's four-part test and concluded that the County's M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. "If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id.*, quoting *Eng'g Contractors Ass'n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id.* at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id.* The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity .... *Id.*

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id.* The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id.* at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id.*

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id.* The court rejected the County's argument that its program was permissible because it set "goals" as opposed to "quotas," because the program in *Engineering Contractors Association* also utilized "goals" and was struck down. *Id.*

Per the M/FBE program's gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id.* at 1383. However, the court held that the County failed to present "sufficient probative evidence" of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id.*

The court found the County's M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id.* On appeal, the Eleventh Circuit affirmed *per curiam*, stating only that it affirmed on the basis of the district court's opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11th Cir. 2000).

21. *Associated Gen. Contractors v. Drabik*, 50 F. Supp.2d 741 (S.D. Ohio 1999)

In this decision, the district court reaffirmed its earlier holding that the State of Ohio's MBE program of construction contract awards is unconstitutional. The court cited to *F. Buddie Contracting v. Cuyahoga Community College*, 31 F. Supp.2d 571 (N.D. Ohio 1998), holding a similar local Ohio program unconstitutional. The court repudiated the Ohio Supreme Court's holding in *Ritchey Produce*, 707 N.E. 2d 871 (Ohio 1999), which held that the State's MBE program as applied to the state's purchase of non-construction-related goods and support services was constitutional. The court found the evidence to be insufficient to justify the MBE program. The court held that the program was not narrowly tailored because there was no evidence that the State had considered a race-neutral alternative.

This opinion underscored that governments must show four factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

22. *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp.2d 1308 (N.D. Fla. 1998)

This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation's ("FDOT") program of "setting aside" certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts "set aside" for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT's claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities "supposedly willing and able to do road maintenance work," and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in "somebody's" discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

F. Recent Decisions Involving the Federal DBE Program and its Implementation by State or Local Government Agencies in Other Jurisdictions

There are several recent and pending cases involving challenges to the United States Federal DBE Program and its implementation by the states and their governmental entities for federally-funded projects. These cases could have a significant impact on the nature and provisions of contracting and procurement on federally-funded projects, including and relating to the utilization of DBEs. In addition, these cases provide an instructive analysis of the recent application of the strict scrutiny test to MBE/WBE- and DBE-type programs.

Recent Decisions in Federal Circuit Courts of Appeal

1. *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F. 3d 1187 (9th Cir. 2013)

The Associated General Contractors of America, Inc., San Diego Chapter, Inc., ("AGC") sought declaratory and injunctive relief against the California Department of Transportation ("Caltrans") and its officers on the grounds that Caltrans' Disadvantaged Business initial Enterprise ("DBE") program unconstitutionally provided race -and sex-based preferences to African American, Native American-, Asian Pacific American-, and woman-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans' DBE program implementing the Federal DBE program and granted summary judgment to Caltrans. The district court held that Caltrans' DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans' substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the

four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans' program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans' DBE program implementing the Federal DBE program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

Court Applies *Western States Paving Co. v. Washington State DOT* Decision. In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F. 3d. 983 (9th Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id.* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id.* Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the Federal DBE program), but struck down Washington DOT's program because it was not narrowly tailored. *Id., citing Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

In *Western States Paving*, the Ninth Circuit announced a two-pronged test for "narrow tailoring":

"(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination." *Id.* 1191, *citing Western States Paving Co.*, 407 F.3d at 997-998.

Evidence gathering and the 2007 Disparity Study. On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id.* at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California's transportation contracting industry. *Id.* The Court noted that disparity analysis involves making a comparison between the availability of minority- and woman-owned businesses and their actual utilization, producing a number called a "disparity index." *Id.* An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id.* An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

The Court found the research firm and the disparity study gathered extensive data to calculate disadvantaged business availability in the California transportation contracting industry. *Id.* at 1191. The Court stated: "Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and woman-owned businesses should be

expected to receive 13.5 percent of contact dollars from Caltrans administered federally assisted contracts." *Id.* at 1191-1192.

The Court said the research firm "examined over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006 to determine actual DBE utilization. The firm assessed disparities across a variety of contracts, separately assessing contracts based on funding source (state or federal), type of contract (prime or subcontract), and type of project (engineering or construction)." *Id.* at 1192.

The Court pointed out a key difference between federally funded and state funded contracts is that race-conscious goals were in place for the federally funded contracts during the 2002–2006 period, but not for the state funded contracts. *Id.* at 1192. Thus, the Court stated: "state funded contracts functioned as a control group to help determine whether previous affirmative action programs skewed the data." *Id.*

Moreover, the Court found the research firm measured disparities in all twelve of Caltrans' administrative districts, and computed aggregate disparities based on statewide data. *Id.* at 1192. The firm evaluated statistical disparities by race and gender. The Court stated that within and across many categories of contracts, the research firm found substantial statistical disparities for African American, Asian–Pacific, and Native American firms. *Id.* However, the research firm found that there were not substantial disparities for these minorities in *every* subcategory of contract. *Id.* The Court noted that the disparity study also found substantial disparities in utilization of woman-owned firms for some categories of contracts. *Id.* After publication of the disparity study, the Court pointed out the research firm calculated disparity indices for all woman-owned firms, including female minorities, showing substantial disparities in the utilization of all woman-owned firms similar to those measured for white women. *Id.*

The Court found that the disparity study and Caltrans also developed extensive anecdotal evidence, by (1) conducting 12 public hearings to receive comments on the firm's findings; (2) receiving letters from business owners and trade associations; and (3) interviewing representatives from 12 trade associations and 79 owners/managers of transportation firms. *Id.* at 1192. The Court stated that some of the anecdotal evidence indicated discrimination based on race or gender. *Id.*

Caltrans' DBE Program. Caltrans concluded that the evidence from the disparity study supported an inference of discrimination in the California transportation contracting industry. *Id.* at 1192-1193. Caltrans concluded that it had sufficient evidence to make race- and gender-conscious goals for African American-, Asian–Pacific American-, Native American-, and woman-owned firms. *Id.* The Court stated that Caltrans adopted the recommendations of the disparity report and set an overall goal of 13.5 percent for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5 percent goal using race-neutral measures. *Id.*

Caltrans submitted its proposed DBE program to the USDOT for approval, including a request for a waiver to implement the program only for the four identified groups. *Id.* at 1193. The Caltrans' DBE program included 66 race-neutral measures that Caltrans already operated or planned to implement, and subsequent proposals increased the number of race-neutral measures to 150. *Id.*

The USDOT granted the waiver, but initially did not approve Caltrans' DBE program until in 2009, the DOT approved Caltrans' DBE program for fiscal year 2009.

District Court proceedings. AGC then filed a complaint alleging that Caltrans' implementation of the Federal DBE Program violated the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act, and other laws. Ultimately, the AGC only argued an as-applied challenge to Caltrans' DBE program. The district court on motions of summary judgment held that Caltrans' program was "clearly constitutional," as it "was supported by a strong basis in evidence of discrimination in the California contracting industry and was narrowly tailored to those groups which had actually suffered discrimination. *Id.* at 1193.

Subsequent Caltrans Study and Program. While the appeal by the AGC was pending, Caltrans commissioned a new disparity study from BBC to update its DBE program as required by the federal regulations. *Id.* at 1193. In August 2012, BBC published its second disparity report, and Caltrans concluded that the updated study provided evidence of continuing discrimination in the California transportation contracting industry against the same four groups and Hispanic Americans. *Id.* Caltrans submitted a modified DBE program that is nearly identical to the program approved in 2009, except that it now includes Hispanic Americans and sets an overall goal of 12.5 percent, of which 9.5 percent will be achieved through race- and gender-conscious measures. *Id.* The USDOT approved Caltrans' updated program in November 2012. *Id.*

Jurisdiction issue. Initially, the Ninth Circuit Court of Appeals considered whether it had jurisdiction over the AGC's appeal based on the doctrines of mootness and standing. The Court held that the appeal is not moot because Caltrans' new DBE program is substantially similar to the prior program and is alleged to disadvantage AGC's members "in the same fundamental way" as the previous program. *Id.* at 1194.

The Court, however, held that the AGC did not establish associational standing. *Id.* at 1194-1195: The Court found that the AGC did not identify any affected members by name nor has it submitted declarations by any of its members attesting to harm they have suffered or will suffer under Caltrans' program. *Id.* at 1194-1195. Because AGC failed to establish standing, the Court held it must dismiss the appeal due to lack of jurisdiction. *Id.* at 1195.

Caltrans' DBE Program held constitutional on the merits. The Court then held that even if AGC could establish standing, its appeal would fail. *Id.* at 1194-1195. The Court held that Caltrans' DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. *Id.* at 1195-1200.

The Court stated that race-conscious remedial programs must satisfy strict scrutiny and that although strict scrutiny is stringent, it is not "fatal in fact." *Id.* at 1194-1195 (quoting *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 237 (1995) (*Adarand III*)). The Court quoted *Adarand III*: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* (quoting *Adarand III*, 515 U.S. at 237.)

The Court pointed out that gender-conscious programs must satisfy intermediate scrutiny which requires that gender-conscious programs be supported by an 'exceedingly persuasive

justification' and be substantially related to the achievement of that underlying objective. *Id.* at 1195 (*citing Western States Paving,* 407 F.3d at 990 n. 6.).

The Court held that Caltrans' DBE program contains both race- and gender-conscious measures, and that the "entire program passes strict scrutiny." *Id.* at 1195.

Application of strict scrutiny standard articulated in *Western States Paving*. The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western States Paving.* The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be "limited to those minority groups that have actually suffered discrimination." *Id.* at 1195-1196 (quoting *Western States Paving,* 407 F.3d at 997–99).

Evidence of discrimination in California contracting industry. The Court held that in Equal Protection cases, courts consider statistical and anecdotal evidence to identify the existence of discrimination. *Id.* at 1196. The U.S. Supreme Court has suggested that a "significant statistical disparity" could be sufficient to justify race-conscious remedial programs. *Id.* at *7 (*citing City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 509 (1989)). The Court stated that although generally not sufficient, anecdotal evidence complements statistical evidence because of its ability to bring "the cold numbers convincingly to life." *Id.* (quoting *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 339 (1977)).

The Court pointed out that Washington DOT's DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington's data "did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state." *Id.* (quoting *Western States Paving,* 407 F.3d at 999-1001). The Court said that it struck down Washington's program after determining that the record was devoid of any evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry." *Id.*

Significantly, the Court held in this case as follows: "In contrast, Caltrans' affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry." *Id.* at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and woman-owned firms. *Id.* The Court found the disparity study "accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs." *Id.* (*citing Western States,* 407 F.3d at 1000).

The Court also held: "Moreover, the statistical evidence from the disparity study is bolstered by anecdotal evidence supporting an inference of discrimination. The substantial statistical disparities alone would give rise to an inference of discrimination, *see Croson,* 488 U.S. at 509,

and certainly Caltrans' statistical evidence combined with anecdotal evidence passes constitutional muster." *Id.* at 1196.

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of "specific acts" of "deliberate" discrimination by Caltrans employees or prime contractors. *Id.* at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that "[t]he degree of specificity required in the findings of discrimination ... may vary." *Id.* at 1197 (quoting *Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (*citing Croson*, 488 U.S. at 509). The Court rejected AGC's argument that Caltrans' program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

The Court rejected a second argument by AGC that this study showed inconsistent results for utilization of minority businesses depending on the type and nature of the contract, and thus cannot support an inference of discrimination in the entire transportation contracting industry. *Id.* at 1197. AGC argued that each of these subcategories of contracts must be viewed in isolation when considering whether an inference of discrimination arises, which the Court rejected. *Id.* The Court found that AGC's argument overlooks the rationale underpinning the constitutional justification for remedial race-conscious programs: they are designed to root out "patterns of discrimination." *Id.* quoting *Croson*, 488 U.S. at 504.

The Court stated that the issue is not whether Caltrans can show underutilization of disadvantaged businesses in *every* measured category of contract. But rather, the issue is whether Caltrans can meet the evidentiary standard required by *Western States Paving* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into "a system of racial exclusion practiced by elements of the local construction industry." *Id.* at 1197 quoting *Croson* 488 U.S. at 492.

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. *Id.* at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly-funded contracts. *Id.*

Third, the Court considered and rejected AGC's argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at *9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the "good ole boy" network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have

identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id.* at 1198, *citing Western States Paving*, 407 and *AGCC II*, 950 F.2d at 1414.

The Court found that AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. *Id.* at 1198. The Court said that Caltrans does not claim, and the anecdotal evidence does not need to prove, that *every* minority-owned business is discriminated against. *Id.* The Court concluded: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* The individual accounts of discrimination offered by Caltrans, according to the Court, met this burden. *Id.*

Fourth, the Court rejected AGC's contention that Caltrans' evidence does not support an inference of discrimination against all women because gender-based disparities in the study are limited to white women. *Id.* at 1198. AGC, the Court said, misunderstands the statistical techniques used in the disparity study, and that the study correctly isolates the effect of gender by limiting its data pool to white women, ensuring that statistical results for gender-based discrimination are not skewed by discrimination against minority women on account of their race. *Id.*

In addition, after AGC's early incorrect objections to the methodology, the research firm conducted a follow-up analysis of all woman-owned firms that produced a disparity index of 59. *Id.* at 1198. The Court held that this index is evidence of a substantial disparity that raises an inference of discrimination and is sufficient to support Caltrans' decision to include all women in its DBE program. *Id.* at 1195.

Program tailored to groups who actually suffered discrimination. The Court pointed out that the second prong of the test articulated in *Western States Paving* requires that a DBE program be limited to those groups that actually suffered discrimination in the state's contracting industry. *Id.* at 1198. The Court found Caltrans' DBE program is limited to those minority groups that have actually suffered discrimination. *Id.* The Court held that the 2007 disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian Pacific American-, and woman-owned firms across a range of contract categories. *Id.* at 1198-1199. *Id.* These disparities, according to the Court, support an inference of discrimination against those groups. *Id.*

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id.* at 1199. California applied for and received a waiver from the US DOT in order to limit its 2009 program to African American, Native American, Asian Pacific American, and woman-owned firms. *Id.* The Court held that Caltrans' program "adheres precisely to the narrow tailoring requirements of *Western States.*" *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for

disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are "sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors." *Id.*

Consideration of race–neutral alternatives. The Court rejected the AGC assertion that Caltrans' program is not narrowly tailored because it failed to evaluate race-neutral measures before implementing the system of racial preferences, and stated the law imposes no such requirement. *Id.* at 1199. The Court held that *Western States Paving* does not require states to independently meet this aspect of narrow tailoring, and instead focuses on whether the federal statute sufficiently considered race-neutral alternatives. *Id.*.

Second, the Court found that even if this requirement does apply to Caltrans' program, narrow tailoring only requires "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 1199, *citing Grutter v. Bollinger,* 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC's claim that Caltrans' program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

Certification affidavits for Disadvantaged Business Enterprises. The Court rejected the AGC argument that Caltrans' program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination in California. *Id.* at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Sect. 1144 (2005)). *Id.* at 1200.

Application of program to mixed state- and federally-funded contracts. The Court also rejected AGC's challenge that Caltrans applies its program to transportation contracts funded by both federal and state money. *Id.* at 1200. The Court held that this is another impermissible collateral attack on the federal program, which explicitly requires goals to be set for mix-funded contracts. *Id.*

Conclusion. The Court concluded that the AGC did not have standing, and that further, Caltrans' DBE program survives strict scrutiny by: 1) having a strong basis in evidence of discrimination within the California transportation contracting industry, and 2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at 1200. The Court then dismissed the appeal. *Id.*

2. *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006)

This case out of the Ninth Circuit struck down a state's implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington's implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test.

The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. ("plaintiff") was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9th Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington DOT ("WSDOT") under the Transportation Act for the 21st Century ("TEA-21"). *Id.*

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id.* at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. *Id.* The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id.* TEA-21 indicates the 10 percent DBE utilization requirement is "aspirational," and the statutory goal "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent." *Id.*

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to "adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies." *Id.* at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id.* (citing regulation). TEA-21 requires a generalized, "undifferentiated" minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*, between Hispanics, blacks, and women). *Id.* at 990 (citing regulation).

"A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses." *Id.* (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to "obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means." *Id.* (citing regulation).

A prime contractor must use "good faith efforts" to satisfy a contract's DBE utilization goal. *Id.* (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id.* (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff's bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff's bid due to the minority utilization requirement. *Id.*

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id.* The district court rejected both of plaintiff's challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id.* at 988. The district court rejected the as-applied challenge concluding that Washington's implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id.* at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it "would not yield a different result." *Id.* at 990, n. 6.

Facial challenge (Federal Government). The court first noted that the federal government has a compelling interest in "ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." *Id.* at 991, *citing City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* ("Adarand VII"), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that "[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination." *Id.* at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id.* However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. *Id.* The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id.* at 992-93. The court accordingly rejected plaintiff's facial challenge. *Id.*

As-applied challenge (State of Washington). Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington's transportation contracting industry. *Id.* at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id.* The United States

intervened to defend TEA-21's facial constitutionality, and "unambiguously conceded that TEA-21's race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present." *Id.* at 996; *see also* Br. for the United States at 28 (April 19, 2004) ("DOT's regulations ... are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient." (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id.* at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress's nationwide remedial objective. *Id.* However, the Eighth Circuit did consider whether the states' implementation of TEA-21 was narrowly tailored to achieve Congress's remedial objective. *Id.* The Eighth Circuit thus looked to the states' independent evidence of discrimination because "to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed." *Id.* (internal citations omitted). The Eighth Circuit relied on the states' statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id.* at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id.* However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id.* Rather, the court held that whether Washington's DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington's transportation contracting industry. *Id.* at 997-98. "If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex." *Id.* at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. *Id.* at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id.* at 998, *citing Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997), it had "previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination." *Id.* In *Monterey Mechanical*, the court held that "the overly inclusive designation of benefited minority groups was a 'red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.'" *Id., citing Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id.* at 998-99, *citing Builders Ass'n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT's DBE program must have suffered discrimination within the State. *Id.* at 999.

The court found that WSDOT's program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." *Id.* Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination "because it lacked any statistical studies evidencing such discrimination." *Id.*

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (*i.e.*, 9% participation could be achieved through race-neutral means). *Id.* at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id.*

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id.* It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State's transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action's component. *Id.* The court found that the State's methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id.* The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id.* The court also found the State conceded as much to the district court. *Id.*

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without "does not provide any evidence of discrimination against DBEs." *Id.* The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id.* However, the court determined that such evidence was entitled to "little weight" because it did not take into account a multitude of other factors such as firm size. *Id.*

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id.* at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id.* The court rejected the State's argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id.* Accordingly, the court held that because the State failed to proffer

evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress's compelling remedial interest. *Id.* at 1002-03.

The court affirmed the district court's grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State's liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

3. *Western States Paving Co. v. Washington DOT, US DOT & FHWA*, 2006 WL 1734163 (W.D. Wash. June 23, 2006) (unpublished opinion)

This case was before the district court pursuant to the Ninth Circuit's remand order in *Western States Paving Co. Washington DOT, US DOT, and FHWA*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff's claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision, *supra*, the district court dismissed plaintiff's claim for injunctive relief as moot. The court found "it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*," and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving's claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City or the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT's unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the "State defendants." Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and improperly relied on the affidavits of contractors seeking DBE certification "who averred that they had been subject to 'general societal discrimination.'"

Third, the court dismissed plaintiff's 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff's 42 U.S.C. §2000d claim to proceed against WSDOT because it was not similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d et seq.) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that "a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ... Title VI." The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT's DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff's claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff's §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff's race when calculating the annual utilization goal. The court held that since the policy was not "facially neutral" — and was in fact "specifically race conscious" — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT's program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT's Motion for Summary Judgment on the §2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

4. *Braunstein v. Arizona DOT*, 683 F.3d 1177 (9th Cir. 2012)

Braunstein is an engineering contractor that provided subsurface utility location services for Arizona DOT. Braunstein sued the Arizona DOT and others seeking damages under the Civil Rights Act, pursuant to §§ 1981 and 1983, and challenging the use of Arizona's former affirmative action program, or race- and gender- conscious DBE program implementing the federal DBE program, alleging violation of the equal protection clause.

Factual background. The Arizona DOT solicited bids for a new engineering and design contract. Six firms bid on the prime contract, but Braunstein did not bid because he could not satisfy a requirement that prime contractors complete 50 percent of the contract work themselves. Instead, Braunstein contacted the bidding firms to ask about subcontracting for the utility location work. 683 F.3d at 1181. All six firms rejected Braunstein's overtures, and Braunstein did not submit a quote or subcontracting bid to any of them. *Id.*

As part of the bid, the prime contractors were required to comply with federal regulations that provide states receiving federal highway funds maintain a DBE program. 683 F.3d at 1182. Under this contract, the prime contractor would receive a maximum of five points for DBE participation. *Id.* at 1182. All six firms that bid on the prime contract received the maximum five points for DBE participation. All six firms committed to hiring DBE subcontractors to perform at least 6 percent of the work. Only one of the six bidding firms selected a DBE as its desired utility location subcontractor. Three of the bidding firms selected another company other than Braunstein to perform the utility location work. *Id.* DMJM won the bid for the 2005 contract using Aztec to perform the utility location work. Aztec was not a DBE. *Id.* at 1182.

District Court rulings. Braunstein brought this suit in federal court against the Arizona DOT and employees of the DOT alleging that ADOT violated his right to equal protection by using race and gender preferences in its solicitation and award of the 2005 contract. The district court dismissed as moot Braunstein's claims for injunctive and declaratory relief because ADOT had

suspended its DBE program in 2006 following the Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT*, 407 F.3d 9882 (9th Cir. 2005). This left only Braunstein's damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id.* at 1183.

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT's DBE program had affected him personally. The court noted that "Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract." *Id.* at 1183. The district court found that Braunstein's inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

Lack of standing. The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT's DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis. *Id.* at 1185. The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id.*

The Court also pointed out that Braunstein did not seek prospective relief against the government "affirmative action" program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id.* at 1186. Thus, Braunstein's surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is "able and ready" to seek subcontracting work. *Id.*

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the six prospective prime contractors rejected him as a subcontractor. *Id.* at 1186. The Court stated that there was nothing in the record indicating the ADOT DBE program posed a barrier that impeded Braunstein's ability to compete for work as a subcontractor. *Id.* at 1187. The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff's showing that he has been subjected to such a barrier. *Id.* at 1186.

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id.* at 1186. At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id.* at 1187.

Summary Judgment granted to ADOT. The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id.* The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

5. *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004)

This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case also is instructive in its analysis of the narrowly tailored requirement for state DBE programs. In upholding the challenged Federal DBE Program at issue in this case the Eighth Circuit emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

In *Sherbrooke Turf, Inc. v. Minnesota DOT*, and *Gross Seed Company v. Nebraska Department of Roads*, the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 C.F.R. Part 26). The court held the Federal Program was narrowly tailored to remedy a compelling governmental interest. The court also held the federal regulations governing the states' implementation of the Federal DBE Program were narrowly tailored, and the state DOT's implementation of the Federal DBE Program was narrowly tailored to serve a compelling government interest.

Sherbrooke and Gross Seed both contended that the Federal DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment's Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE Program and the implementation of the Program by the Minnesota DOT and the Nebraska Department of Roads ("Nebraska DOR") under a strict scrutiny analysis and held that the Federal DBE Program was valid and constitutional and that the Minnesota DOT's and Nebraska DOR's implementation of the Program also was constitutional and valid. Applying the strict scrutiny analysis, the court first considered whether the Federal DBE Program established a compelling governmental interest, and found that it did. It concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand*, 228 F.3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, Sherbrooke and Gross Seed argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The government argued, and the district courts below agreed, that participating states need not independently meet the strict scrutiny standard because under the DBE Program the state must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in *Adarand*. The Eighth Circuit concluded that neither side's position is entirely sound.

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a

national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state's implementation becomes relevant to a reviewing court's strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

The court held that a reviewing court applying strict scrutiny must determine if the race-based measure is narrowly tailored. That is, whether the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. The contractors have the ultimate burden of establishing that the DBE Program is not narrowly tailored. *Id.* The compelling interest analysis focused on the record before Congress; the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

For determining whether a race-conscious remedy is narrowly tailored, the court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *Id.* Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to USDOT an overall goal for DBE participation in its federally-funded highway contracts. *See,* 49 C.F.R. § 26.45(f)(1). The overall goal "must be based on demonstrable evidence" as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 C.F.R. § 26.45(b). The number may be adjusted upward to reflect the state's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *See,* 49 C.F.R. § 26.45(d).

The state must meet the "maximum feasible portion" of its overall goal by race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *See,* 49 C.F.R. § 26.45(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas. 49 C.F.R. § 26.45(b). During the course of the year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods "[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination." 49 C.F.R. § 26.51(f).

Absent bad faith administration of the program, a state's failure to achieve its overall goal will not be penalized. *See,* 49 C.F.R. § 26.47. If the state meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal for a year. *See,* 49 C.F.R. § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See,* 49 C.F.R. § 26.15(b).

Like the district courts below, the Eighth Circuit concluded that the USDOT regulations, on their face, satisfy the Supreme Court's narrowing tailoring requirements. First, the regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting. 345 F.3d at 972. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious good faith consideration of workable race-neutral alternatives. 345 F.3d at 971, *citing Grutter v. Bollinger,* 539 U.S. 306.

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds $750,000.00 cannot qualify as economically disadvantaged. *See*, 49 C.F.R. § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id.* 49 C.F.R. § 26.51(f)(3).

Third, the court found, the USDOT has tied the goals for DBE participation to the relevant labor markets. The regulations require states to set overall goals based upon the likely number of minority contractors that would have received federal assisted highway contracts but for the effects of past discrimination. *See*, 49 C.F.R. § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires states to focus on establishing realistic goals for DBE participation in the relevant contacting markets. *Id.* at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and Gross Seed also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, *citing* 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent woman-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally-assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact that DBE participation in State highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999 when its previous DBE Program was suspended by the injunction by the district court in an earlier decision in *Sherbrooke*. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs, and determined that portion

based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

The contractor presented evidence attacking the reliability of the data in the study, but it failed to establish that better data were available or that Minnesota DOT was otherwise unreasonable in undertaking this thorough analysis and relying on its results. *Id.* The precipitous drop in DBE participation when no race-conscious methods were employed, the court concluded, supports Minnesota DOT's conclusion that a substantial portion of its overall goal could not be met with race-neutral measures. *Id.* On that record, the court agreed with the district court that the revised DBE Program serves a compelling government interest and is narrowly tailored on its face and as applied in Minnesota.

In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10 percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.7 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95 percent DBE participation and predicted that 4.82 percent of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. The Eighth Circuit concluded that Gross Seed, like Sherbrooke, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke*. (*See* district court opinions discussed *infra*.).

6. *Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), aff'd 345 F.3d 964 (8th Cir. 2003)

Sherbrooke involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the "federal affirmative action programs," the USDOT implementing regulations, and the Minnesota DOT's participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at *1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of "random inclusion" of various groups as being within the Program in connection with whether the Federal DBE Program is "narrowly tailored." The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the "potentially invidious effects of providing blanket benefits to minorities" in part,

> by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota's DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota's overall DBE contracting goal.

Sherbrooke, 2001 WL 1502841 at *10 (D. Minn.).

The court rejected plaintiff's claim that the Minnesota DOT must independently demonstrate how its program comports with *Croson's* strict scrutiny standard. The court held that the "Constitution calls out for different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the Program." *Id.* at *11 (emphasis added). The court in a footnote ruled that TEA-21, being a federal program, "relieves the state of any burden to independently carry the strict scrutiny burden." *Id.* at *11 n. 3. The court held states that establish DBE programs under TEA-21 and 49 C.F.R. Part 26 are implementing a Congressionally-required program and not establishing a local one. As such, the court concluded that the state need not independently prove its DBE program meets the strict scrutiny standard. *Id.*

7. *Gross Seed Co. v. Nebraska Department of Roads*, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), aff'd 345 F.3d 964 (8th Cir. 2003)

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 C.F.R. Part 26) is constitutional. The court also held that the Nebraska Department of Roads ("Nebraska DOR") DBE Program adopted and implemented solely to comply with the Federal DBE Program is "approved" by the court because the court found that 49 C.F.R. Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program. The court points out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved the use of Nebraska DOR's proposed DBE goals for fiscal year 2001, pending completion of USDOT's review of those goals. Significantly, however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to

demonstrate that past discrimination does exist "in the construction industry" and that racial and gender discrimination "within the construction industry" is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The court held that the Federal DBE Program was sufficiently "narrowly tailored" to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

8. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, 534 U.S. 103 (2001)

This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari "as improvidently granted" without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the USDOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is "narrowly tailored," and therefore upheld the constitutionality of the Federal DBE Program.

It is significant to note that the court in determining the Federal DBE Program is "narrowly tailored" focused on the current regulations, 49 C.F.R. Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

> [y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, 49 C.F.R. § 26.51(a)(2000); *see also* 49 C.F.R. § 26.51(f)(2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, *see* 49 C.F.R. § 26.51(b)(2000). The current regulations also outline several race-neutral means available to program recipients including assistance

> in overcoming bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. *See* 49 C.F.R. § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. 228 F.3d at 1178-1179.

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state's construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress's power to enact nationwide legislation. *Id.* at 1185-1186. The court held that because of the "unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications," extrapolating findings of discrimination against the various ethnic groups "is more a question of nomenclature than of narrow tailoring." *Id.* The court found that the "Constitution does not erect a barrier to the government's effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications." *Id.*

Finally, the Tenth Circuit did not specifically address a challenge to the letting of federally-funded construction contracts by state departments of transportation. The court pointed out that plaintiff Adarand "conceded that its challenge in the instant case is to 'the federal program, implemented by federal officials,' and not to the letting of federally-funded construction contracts by state agencies." 228 F.3d at 1187. The court held that it did not have before it a sufficient record to enable it to evaluate the separate question of Colorado DOT's implementation of race-conscious policies. *Id.* at 1187-1188.

Recent District Court Decisions

9. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014) *appeal pending* in the U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003

Factual and procedural background. *In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, Plaintiff Mountain West Holding Co., Inc. ("Mountain West"), alleges it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation ("MDT") and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

The State of Montana commissioned a disparity study which was completed in 2009. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national

origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all "relevant" minority groups were underutilized in "professional services" and Asian Pacific Americans and Hispanic Americans were underutilized in "business categories combined," but it also concluded that all "relevant" minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are "significantly overrepresented" in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the Montana DOT filed cross Motions for Summary Judgment.

Western States Paving Co. v. Washington DOT. The Court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 71 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The Court noted that in *Western States*, the Ninth Circuit held that a state's implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at *2 (D. Mont. November 26, 2014). The Court stated the Ninth Circuit held that whether a state's implementation of the DBE Program "is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry." *Id.* at *2, quoting *Western States*, at 997-998. The Court in *Mountain West* also pointed out the Ninth Circuit held that "even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination." *Mountain West*, 2014 WL 6686734 at *2, quoting *Western States*, 407 F.3d at 998.

Montana DOT study. The Montana DOT obtained a firm to conduct a disparity study, which was completed in 2009. The Court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in "professional services" contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in "business categories combined," slight underutilization of nonminority women in "business categories

combined," and overutilization of all groups in subcontractor "construction" contracts. *Mountain West*, 2014 WL 6686734 at *2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The Court stated the anecdotal evidence suggested various forms of discrimination existed within Montana's transportation contracting industry, including evidence of an exclusive "good ole boy network" that made it difficult for DBEs to break into the market. *Id.* at *3. The Court said that despite these findings, the consulting firm recommended that Montana DOT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that Montana DOT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

Montana's DBE utilization after ceasing the use of contract goals. The Court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at *3. The utilization rate dropped, according to the Court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent *Id.* In response to this decline, for fiscal years 2011-2014, the Court said Montana DOT employed contract goals on certain USDOT contracts in order to achieve 3.27 percentage points of Montana's overall goal of 5.83 percent DBE utilization.

Montana DOT then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. *Id.* US DOT approved the new and current goal methodology for Montana DOT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

Mountain West's claims for relief. Mountain West seeks declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the Montana DOT for alleged violation of Title VI. 2014 WL 6686734 at *3. Mountain West's claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the Montana DOT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id.* Mountain West brings an as-applied challenge to Montana's DBE program. *Id.*

The two-prong test to demonstrate that a DBE program is narrowly tailored. The Court, citing AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. *Mountain West*, at *5.

The Court said that a state implementing the facially valid Federal DBE Program need not demonstrate an independent compelling interest for its implementation of the DBE Program because when Congress passed the relevant legislation it identified a compelling nationwide interest in remedying discrimination in the transportation contracting industry. *Id.* at *4. In order to pass such scrutiny, the Court found a state need only demonstrate that its program is narrowly tailored. *Id.* at *3, *citing Western States,* 407 F.3d 997.

The Court held that states can meet the evidentiary standard required by *Western States* if, looking at the evidence in its entirety, "the data shows substantial disparities in utilization of minority firms suggesting that public dollars are being poured into 'a system of racial exclusion practiced by elements of the local construction industry." '*Mountain West,* at *5, *quoting AGC, San Diego v. California DOT,* 713 F.3d at 1197. The Court in *Mountain West* said that the federal guidelines provide that narrow tailoring does not require a state to parse its DBE Program to distinguish between certain types of contracts within the transportation contracting industry. *Mountain West,* at *5, *citing AGC, San Diego,* 713 F.3d at 1199.

The Court in *Mountain West,* following *AGC, San Diego,* concluded that a state's implementation of the DBE Program need not require minority firms to attest to the fact that they have been discriminated against in the relevant jurisdiction because such a requirement is contrary to federal regulation, and thus would constitute "an impermissible collateral attack on the facial validity of the federal Act and regulations." *Mountain West,* at *5, quoting *AGC, San Diego,* at 1200.

Statistical evidence. The Court held that Montana's DBE program passes strict scrutiny. The Court found that Mountain West could not create a genuine dispute about the fact that the 2009 disparity study indicated significant underutilization of all minority groups in the award of professional services contracts in Montana's transportation contracting market. *Mountain West,* at *5. In addition, the Court found that Mountain West could not dispute that the study indicated significant underutilization of Asian Pacific Americans and Hispanic Americans in the award of contracts in business categories combined in Montana's transportation contracting market. *Id.* Also, the Court found that Mountain West could not dispute that the study also indicated underutilization of nonminority women and business categories combined, and that the study documented, through surveys and otherwise, significant anecdotal evidence of various forms of discrimination in Montana's transportation contracting industry. *Id.*

The Court noted that Mountain West merely disputed the validity of the findings in the study and argued that the methods the study used in gathering statistical and anecdotal evidence were flawed. *Id.* at *6. The Court found that in mounting this attack on the study, Mountain West relied entirely on the expert report of Dr. George "Lanoue" (sic), and that Mountain West only cited to two pages in the report in which Dr. LaNoue opined that the table showing DBE utilization and business categories combined was improperly calculated. *Id.*

Mountain West, the Court stated, provided no evidence indicating that the data showing significant underutilization of all minority groups and professional services was invalid. *Id.* at *6. In addition, the Court found contrary to the allegation by Mountain West, that the study controlled for factors other than discrimination in calculating DBE utilization and adjusted its

calculation of the availability of DBE firms based on its control for factors other than discrimination *Id.*

Anecdotal evidence. The Court said that the attack on the study did not diminish the fact the study uncovered substantial anecdotal evidence of discrimination in Montana's transportation contracting market, including evidence of a "good ole boy network." *Id.* at *6. The Court said that in *AGC, San Diego*, the Ninth Circuit noted "federal courts and regulations have identified precisely [the factors associated with good ole boy networks] as barriers that disadvantage minority firms because of the lingering effects of discrimination." *Mountain West*, at *6, *quoting AGC, San Diego*, at 1197-98.

In connection with the anecdotal evidence, the Court stated that Dr. LaNoue's report merely criticized the sample size of the responses obtained, and that Mountain West also contended the anecdotal evidence is unreliable because Montana did not present affidavits in support of the anecdotal evidence gathered. *Id.* at *6. Contrary to Mountain West's assertions, the Court held that nothing in *Western States* requires that anecdotal survey evidence gathered by a private firm assisting a state in preparing its goal methodology to the state's DBE program must be supported by affidavits. *Mountain West*, at *6.

The Court concluded that Mountain West failed to create a genuine dispute that anecdotal evidence indicates the existence of discrimination in Montana's transportation contracting industry. *Id.* at *6. The Court pointed out the Ninth Circuit held in *AGC, San Diego* that "substantial statistical disparities alone would give rise to an inference of discrimination, and certainly... statistical evidence combined with anecdotal evidence passes constitutional muster." *Mountain West* at *6, quoting *AGC, San Diego*, 713 F.3d at 1196.

Precipitous drop in utilization. The Court in *Mountain West* also found that neither Dr. LaNoue's report nor any other evidence presented by Mountain West created a genuine dispute about the fact DBE utilization in Montana's transportation contracting industry dropped precipitously after 2006 when Montana ceased using contract goals. *Mountain West* at *6. The Court found that while the study indicated Montana should utilize DBEs at a rate of 5.83 percent, by 2010, DBE utilization in Montana had fallen "dramatically" to 0.8 percent. *Id.* at *6. The Court held that this undisputed fact "strongly supports [Defendants'] claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination." *Mountain West*, at *6, quoting *Adarand Contractors, Inc. v. Slater*, 228 F.3d 1147, 1174 (10th Cir. 2000).

Conclusion and holding. In sum, the Court held that Montana presented sufficient evidence to demonstrate evidence of discrimination in Montana's transportation contracting industry. *Id.* at *7. The Court concluded that Montana's DBE program is sufficiently narrowly tailored to address discrimination against only those groups that have actually suffered discrimination in the state's transportation contracting industry based on the facts that (1) statistical evidence suggests that all minority groups in professional services are significantly underutilized, (2) there is evidence of an exclusive "good ole boy network" within the state contracting industry, and (3) DBE underutilization dramatically increased after 2006 when the State ceased using contract goals. *Id.* at *7.

Therefore, the Court held Montana's DBE program survives such scrutiny by: (1) having a strong basis in evidence of discrimination within Montana's transportation contracting industry; and (2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id* at *7.

The Court also held that Mountain West failed to create a genuine dispute relative to its claims regarding Montana's DBE program during 2012-2014 when Montana and Montana DOT utilized contract goals. *Id.* It follows then, according to the Court, that Mountain West's claims for prospective, injunctive and declaratory relief also failed because Montana has currently ceased using contract goals and any potential utilization of contract goals will be based on a not-yet conducted disparity study. *Id.* Therefore, the Court ordered that Montana and Montana DOT are entitled to summary judgment on all claims.

The decision of the District Court has been appealed by Mountain West to the U.S. Court of Appeals for the Ninth Circuit, Docket No. 14-36097 (December 26, 2014).

10. *Geyer Signal, Inc. v. Minnesota, DOT*, 2014 WL 1309092 (D. Minn. March 31, 2014)

In *Geyer Signal, Inc., et al. v. Minnesota DOT, U.S. DOT, Federal Highway Administration, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT's implementation of the DBE Program on its face and as applied. Geyer Signal sought an injunction against the Minnesota DOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the Program improperly; a declaratory judgment declaring that the DBE Program violates the Equal protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that Minnesota DOT's implementation of the Program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.

Procedural background. Plaintiff Geyer Signal is a small, family-owned business that performs traffic control work generally on road construction projects. Geyer Signal is a majority-owned firm by a Caucasian male, who also is a named plaintiff.

Subsequent to the lawsuit filed by Geyer Signal, the USDOT and the Federal Highway Administration ("FHWA") filed their Motion to permit them to intervene as defendants in this case. The Federal Defendant-Intervenors requested intervention on the case in order to defend the constitutionality of the Federal DBE Program and the federal regulations at issue. The Federal Defendant-Intervenors and the plaintiffs filed a Stipulation that the Federal Defendant-Intervenors have the right to intervene and should be permitted to intervene in the matter, and consequently the plaintiffs did not contest the Federal Defendant-Intervenor's Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Intervenors may intervene in this lawsuit, be approved and that the Federal Defendant-Intervenors are permitted to intervene in this case.

The federal defendants moved for summary judgment and the state defendants moved to dismiss, or in the alternative for summary judgment, arguing that the DBE Program on its face and as implemented by MnDOT is constitutional. The Court concluded that the plaintiffs, Geyer Signal and its white male owner, Kevin Kissner, raised no genuine issue of material fact with respect to the constitutionality of the DBE Program facially or as applied. Therefore, the Court granted the federal defendants and the state defendants' motions for summary judgment in their entirety.

Plaintiffs alleged that there is insufficient evidence of a compelling governmental interest to support a race based program for DBE use in the fields of traffic control or landscaping. (2014 WL 1309092 at *10) Additionally, plaintiffs alleged that the DBE Program is not narrowly tailored because it (1) treats the construction industry as monolithic, leading to an overconcentration of DBE participation in the areas of traffic signal and landscaping work; (2) allows recipients to set contract goals; and (3) sets goals based on the number of DBEs there are, not the amount of work those DBEs can actually perform. *Id.* at *10. Plaintiffs also alleged that the DBE Program is unconstitutionally vague because it allows prime contractors to use bids from DBEs that are higher than the bids of non-DBEs, provided the increase in price is not unreasonable, without defining what increased costs are "reasonable." *Id.*

Constitutional claims. The Court states that the "heart of plaintiffs' claims is that the DBE Program and MnDOT's implementation of it are unconstitutional because the impact of curing discrimination in the construction industry is overconcentrated in particular sub-categories of work." *Id.* at *11. The Court noted that because DBEs are, by definition, small businesses, plaintiffs contend they "simply cannot perform the vast majority of the types of work required for federally-funded MnDOT projects because they lack the financial resources and equipment necessary to conduct such work. *Id.*

As a result, plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are spread out over the entire contract. *Id.* Plaintiffs asserted that prime contractors are forced to disproportionately use DBEs in those small areas of work, and that non–DBEs in those areas of work are forced to bear the entire burden of "correcting discrimination", while the vast majority of non-DBEs in MnDOT contracting have essentially no DBE competition. *Id.*

Plaintiffs therefore argued that the DBE Program is not narrowly tailored because it means that any DBE goals are only being met through a few areas of work on construction projects, which burden non-DBEs in those sectors and do not alleviate any problems in other sectors. *Id.* at *11.

Plaintiffs brought two facial challenges to the Federal DBE Program. *Id.* Plaintiffs allege that the DBE Program is facially unconstitutional because it is "fatally prone to overconcentration" where DBE goals are met disproportionately in areas of work that require little overhead and capital. *Id.* at 11. Second, plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs, provided the increased cost is "reasonable" without defining a reasonable increase in cost. *Id.*

Plaintiffs also brought three as-applied challenges based on MnDOT's implementation of the DBE Program. *Id.* at 12. First, plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id.* Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, plaintiffs argued that to the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id.*

Strict scrutiny. It is undisputed that strict scrutiny applied to the Court's evaluation of the Federal DBE Program, whether the challenge is facial or as - applied. *Id.* at *12. Under strict scrutiny, a "statute's race-based measures 'are constitutional only if they are narrowly tailored to further compelling governmental interests.'" *Id.* at *12, quoting *Grutter v. Bollinger,* 539 U.S. 306, 326 (2003).

The Court notes that the DBE Program also contains a gender conscious provision, a classification the Court says that would be subject to intermediate scrutiny. *Id.* at *12, at n.4. Because race is also used by the Federal DBE Program, however, the Program must ultimately meet strict scrutiny, and the Court therefore analyzes the entire Program for its compliance with strict scrutiny. *Id.*

Facial challenge based on overconcentration. The Court says that in order to prevail on a facial challenge, the plaintiff must establish that no set of circumstances exist under which the Federal DBE Program would be valid. *Id.* at *12. The Court states that plaintiffs bear the ultimate burden to prove that the DBE Program is unconstitutional. *Id* at *12-13.

Compelling government interest. The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *Id.* *13, quoting *Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147, 1165 (10th Cir. 2000). The plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id.* at *13. In accessing the evidence offered in support of a finding of discrimination, the Court concluded that defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id.*

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id.* at *13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id.*

Congressional evidence of discrimination: disparity studies and barriers. Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by

the federal defendants. *Id.* at *13. But, the Court found that plaintiffs did not raise any specific issues with respect to the federal defendants' proffered evidence of discrimination. *Id.* *14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the federal defendants and find all of the flaws. *Id.* *14. Federal defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id.* at *14. Based on these studies, the federal defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id.* at *6.

The federal defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and woman-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and woman-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id.* *6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id.* at *5.

The Court concluded that neither of the plaintiffs' contentions established that Congress lacked a substantial basis in the evidence to support its conclusion that race-based remedial action was necessary to address discrimination in public construction contracting. *Id.* at *14. The Court rejected Plaintiffs' argument that because Congress found multiple forms of discrimination against minority- and woman-owned business, that evidence showed Congress failed to also find that such businesses specifically face discrimination in public contracting, or that such discrimination is not relevant to the effect that discrimination has on public contracting. *Id.*

The Court referenced the decision in *Adarand Constructors, Inc.* 228 F.3d at 1175-1176. In *Adarand,* the Court that found evidence relevant to Congressional enactment of the DBE Program to include that both race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at *14.

The Court, citing again with approval the decision in *Adarand Constructors, Inc.*, found the evidence presented by the federal government demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at *14, quoting *Adarand Constructors, Inc.* 228 F.3d at 1167-68. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination. *Id.* The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination. *Id.* Both kinds of discriminatory barriers preclude existing minority firms from effectively competing for public construction contracts. *Id.*

Accordingly, the Court found that Congress' consideration of discriminatory barriers to entry for DBEs as well as discrimination in existing public contracting establish a strong basis in the evidence for reauthorization of the Federal DBE Program. *Id.* at *14.

Court rejects plaintiffs' general critique of evidence as failing to meet their burden of proof. The Court held that plaintiffs' general critique of the methodology of the studies relied upon by the federal defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id.* at *14. The Court stated that the Eighth Circuit Court of Appeals has already rejected plaintiffs' argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id.* at *14.

Finally, the Court pointed out that plaintiffs have failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. *Id.* at *15. Thus, the Court concluded that plaintiffs failed to meet their ultimate burden to prove that the Federal DBE Program is unconstitutional on this ground. *Id.* at *15, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 971–73.

Therefore, the Court held that plaintiffs did not meet their burden of raising a genuine issue of material fact as to whether the government met its evidentiary burden in reauthorizing the DBE Federal Program, and granted summary judgment in favor of the federal defendants with respect to the government's compelling interest. *Id.* at *15.

Narrowly tailored. The Court states that several factors are examined in determining whether race-conscious remedies are narrowly tailored, and that numerous Federal Courts have already concluded that the DBE Federal Program is narrowly tailored. *Id.* at *15. Plaintiffs in this case did not dispute the various aspects of the Federal DBE Program that courts have previously found to demonstrate narrowly tailoring. *Id.* Instead, plaintiffs argue only that the Federal DBE Program is not narrowly tailored on its face because of overconcentration.

Overconcentration. Plaintiffs argued that if the recipients of federal funds use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small businesses that are limited in the work they can perform, there is no way to avoid overconcentration of DBE participation in a few, limited areas of MnDOT work. *Id.* at *15. Plaintiffs asserted that small businesses cannot perform most of the types of work needed or necessary for large highway projects, and if they had the capital to do it, they would not be small businesses. *Id.* at *16. Therefore, plaintiffs argued the DBE Program will always be overconcentrated. *Id.*

The Court states that in order for plaintiffs to prevail on this facial challenge, plaintiffs must establish that the overconcentration it identifies is unconstitutional, and that there are no circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.* The Court concludes that plaintiffs' claim fails on the basis that there are circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.*

First, the Court found that plaintiffs fail to establish that the DBE Program goals will always be fulfilled in a manner that creates overconcentration, because they misapprehend the nature of the goal setting mandated by the DBE Program. *Id.* at *16. The Court states that recipients set goals for DBE participation based on evidence of the availability of ready, willing and able DBEs to participate on DOT-assisted contracts. *Id.* The DBE Program, according to the Court,

necessarily takes into account, when determining goals, that there are certain types of work that DBEs may never be able to perform because of the capital requirements. *Id.* In other words, if there is a type of work that no DBE can perform, there will be no demonstrable evidence of the availability of ready, willing and able DBEs in that type of work, and those non-existent DBEs will not be factored into the level of DBE participation that a locality would expect absent the effects of discrimination. *Id.*

Second, the Court found that even if the DBE Program could have the incidental effect of overconcentration in particular areas, the DBE Program facially provides ample mechanisms for a recipient of federal funds to address such a problem. *Id.* at *16. The Court notes that a recipient retains substantial flexibility in setting individual contract goals and specifically may consider the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. *Id.* If overconcentration presents itself as a problem, the Court points out that a recipient can alter contract goals to focus less on contracts that require work in an already overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present. *Id.*

The federal regulations also require contractors to engage in good faith efforts that require breaking out the contract work items into economically feasible units to facilitate DBE participation. *Id.* Therefore, the Court found, the regulations anticipate the possible issue identified by plaintiffs and require prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a single DBE can acquire. *Id.* Also, the Court, states that recipients may obtain waivers of the DBE Program's provisions pertaining to overall goals, contract goals, or good faith efforts, if, for example, local conditions of overconcentration threaten operation of the DBE Program. *Id.*

The Court also rejects plaintiffs claim that 49 C.F.R. § 26.45(h), which provides that recipients are not allowed to subdivide their annual goals into "group-specific goals", but rather must provide for participation by all certified DBEs, as evidence that the DBE Program leads to overconcentration. *Id.* at *16. The Court notes that other courts have interpreted this provision to mean that recipients cannot apportion its DBE goal among different minority groups, and therefore the provision does not appear to prohibit recipients from identifying particular overconcentrated areas and remedying overconcentration in those areas. *Id.* at *16. And, even if the provision operated as plaintiffs suggested, that provision is subject to waiver and does not affect a recipient's ability to tailor specific contract goals to combat overconcentration. *Id.* at *16, n. 5.

The Court states with respect to overconcentration specifically, the federal regulations provide that recipients may use incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which the recipient has determined that non-DBEs are unduly burdened. *Id.* at *17. All of these measures could be used by recipients to shift DBEs from areas in which they are overconcentrated to other areas of work. *Id.* at *17.

Therefore, the Court held that because the DBE Program provides numerous avenues for recipients of federal funds to combat overconcentration, the Court concluded that plaintiffs'

facial challenge to the Program fails, and granted the federal defendants' motion for summary judgment. *Id.*

Facial challenged based on vagueness. The Court held that plaintiffs could not maintain a facial challenge against the Federal DBE Program for vagueness, as their constitutional challenges to the Program are not based in the First Amendment. *Id.* at *17. The Court states that the Eighth Circuit Court of Appeals has held that courts need not consider facial vagueness challenges based upon constitutional grounds other than the First Amendment. *Id.*

The Court thus granted federal defendants' motion for summary judgment with respect to plaintiffs' facial claim for vagueness based on the allegation that the Federal DBE Program does not define "reasonable" for purposes of when a prime contractor is entitled to reject a DBEs' bid on the basis of price alone. *Id.*

As-applied challenges to MnDOT's DBE Program: MnDOT's program held narrowly tailored. Plaintiffs brought three as-applied challenges against MnDOT's implementation of the Federal DBE Program, alleging that MnDOT has failed to support its implementation of the Program with evidence of discrimination in its contracting, sets inappropriate goals for DBE participation, and has failed to respond to overconcentration in the traffic control industry. *Id.* at *17.

Alleged failure to find evidence of discrimination. The Court held that a state's implementation of the Federal DBE Program must be narrowly tailored. *Id.* at *18. To show that a state has violated the narrow tailoring requirement of the Federal DBE Program, the Court says a challenger must demonstrate that "better data was available" and the recipient of federal funds "was otherwise unreasonable in undertaking [its] thorough analysis and in relying on its results." *Id.,* quoting *Sherbrook Turf, Inc.* at 973.

Plaintiffs' expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id.* at *18. Plaintiffs' expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id.*

Plaintiffs present no affirmative evidence that discrimination does not exist. The Court held that plaintiffs' disputes with MnDOT's conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT's implementation of the Federal DBE Program is not narrowly tailored. *Id.* at *18. First, the Court found that it is insufficient to show that "data was susceptible to multiple interpretations," instead, plaintiffs must "present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts." *Id.* at *18, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, plaintiffs' expert has not presented affirmative evidence upon which the Court could conclude that no dis-crimination exists in Minnesota's public contracting. *Id.* at *18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id.* at *18. The Court found that it would make little sense to

separate prime contractor and subcontractor availability, when DBEs will also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal. *Id.* at *18, quoting *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of Appeals has already approved in assessing MnDOT's compliance with narrow tailoring in *Sherbrooke Turf*, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id.* at *18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id.* at *18. Accordingly, the Court granted the state defendants' motion for summary judgment with respect to this claim.

Alleged inappropriate goal setting. Plaintiffs second challenge was to the aspirational goals MnDOT has set for DBE performance between 2009 and 2015. *Id.* at *19. The Court found that the goal setting violations the plaintiffs alleged are not the types of violations that could reasonably be expected to recur. *Id.* Plaintiffs raised numerous arguments regarding the data and methodology used by MnDOT in setting its earlier goals. *Id.* But, plaintiffs did not dispute that every three years MnDOT conducts an entirely new analysis of discrimination in the relevant market and establishes new goals. *Id.* Therefore, disputes over the data collection and calculations used to support goals that are no longer in effect are moot. *Id.* Thus, the Court only considered plaintiffs' challenges to the 2013–2015 goals. *Id.*

Plaintiffs raised the same challenges to the 2013–2015 goals as it did to MnDOT's finding of discrimination, namely that the goals rely on multiple approaches to ascertain the availability of DBEs and rely on a measurement of discrimination that accounts for both prime and subcontracting markets. *Id.* at *19. Because these challenges identify only a different interpretation of the data and do not establish that MnDOT was unreasonable in relying on the outcome of the consultants' studies, plaintiffs have failed to demonstrate a material issue of fact related to MnDOT's narrow tailoring as it relates to goal setting. *Id.*

Alleged overconcentration in the traffic control market. Plaintiffs final argument was that MnDOT's implementation of the DBE Program violates the Equal Protection Clause because MnDOT has failed to find overconcentration in the traffic control market and correct for such overconcentration. *Id.* at *20. MnDOT presented an expert report that reviewed four different industries into which plaintiffs' work falls based on NAICs codes that firms conducting traffic control-type work identify themselves by. *Id.* After conducting a disproportionality comparison, the consultant concluded that there was not statistically significant overconcentration of DBEs in plaintiffs' type of work.

Plaintiffs' expert found that there is overconcentration, but relied upon six other contractors that have previously bid on MnDOT contracts, which plaintiffs believe perform the same type of work as plaintiff. *Id.* at *20. But, the Court found plaintiffs have provided no authority for the proposition that the government must conform its implementation of the DBE Program to every individual business' self-assessment of what industry group they fall into and what other businesses are similar. *Id.*

The Court held that to require the State to respond to and adjust its calculations on account of such a challenge by a single business would place an impossible burden on the government because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. *Id.* at *20. This, the Court states, would require the government to run endless iterations of overconcentration analyses to satisfy each business that non-DBEs are not being unduly burdened in its self-defined group, which would be quite burdensome. *Id.*

Because plaintiffs did not show that MnDOT's reliance on its overconcentration analysis using NAICs codes was unreasonable or that overconcentration exists in its type of work as defined by MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify overconcentration or failing to address it. *Id.* at *20. Therefore, the Court granted the state defendants' motion for summary judgment with respect to this claim.

Claims under 42 U.S.C. § 1981 and 42 U.S.C. § 2000. Because the Court concluded that MnDOT's actions are in compliance with the Federal DBE Program, its adherence to that Program cannot constitute a basis for a violation of § 1981. *Id.* at *21. In addition, because the Court concluded that plaintiffs failed to establish a violation of the Equal Protection Clause, it granted the defendants' motions for summary judgment on the 42 U.S.C. § 2000d claim.

Holding. Therefore, the Court granted the federal defendants' motion for summary judgment and the States' Defendants' motion to dismiss/motion for summary judgment, and dismissed all the claims asserted by the plaintiffs.

11. *M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al.*, 2013 WL 4774517 (D. Mont.) (September 4, 2013)

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. ("Weeden") against the State of Montana, Montana Department of Transportation ("DOT") and others, to the DBE Program adopted by Montana DOT implementing the Federal DBE Program at 49 C.F.R. Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the Montana DOT.

Factual background and claims. Weeden was the low dollar bidder with a bid of $14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at *1. Montana DOT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, Montana DOT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only .81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. Montana DOT's DBE Participation Review

Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the Montana DOT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at *2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against Montana DOT to prevent it from letting the contract to another bidder. Weeden claimed that Montana DOT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at *2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that Montana DOT did not provide reasonable notice of the good faith effort requirements. *Id.*

No proof of irreparable harm and balance of equities favor Montana DOT. First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately $26 million, and that Montana DOT had $50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at *3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event Montana DOT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that Montana DOT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at *3. The Court held that a prime contractor,

such as Weeden, is not permitted to challenge Montana DOT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

Court applies *AGC v. California* DOT case; evidence supports narrowly tailored DBE program. Significantly, the Court found that even if Weeden had standing to present an equal protection claim, Montana DOT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at *4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id., citing Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013)(holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination." *Id.* at 4, *citing Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – "is entitled to look at the evidence 'in its entirety' to determine whether there are 'substantial disparities in utilization of minority firms' practiced by some elements of the construction industry." 2013 WL 4774517 at *4, quoting *AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* at *4, quoting *AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that Montana DOT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at *4. Therefore, the Court concluded that given the similarities between Weeden's claim and AGC's equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at *4.

Due process claim. The Court also rejected Weeden's bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at *5. In any event, the Court noted that

Weeden was granted notice, hearing and appeal for Montana DOT's decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at *5.

Holding and voluntary dismissal. The Court denied plaintiff Weeden's application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

12. *Geod Corporation v. New Jersey Transit Corporation, et. al.*, 746 F. Supp.2d 642, (D. N. J. October 19, 2010)

Plaintiffs, white male owners of Geod Corporation ("Geod"), brought this action against the New Jersey Transit Corporation ("NJT") alleging discriminatory practices by *NJT* in designing and implementing the Federal DBE program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT's DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

New Jersey transit program and disparity study. NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Woman-owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id.* at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id.* All groups other than Asian DBEs were found to be underutilized. *Id.*

The court held that the test utilized by the study, "conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id.* at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id.*

For fiscal year 2010, the study consultant followed the "three-step process pursuant to USDOT regulations to establish the NJT DBE goal." *Id.* at 649. First, the consultant determined "the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn." *Id.* In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified "the relevant industries in which NJ Transit contracts," and (3) calculated "the weighted availability measure." *Id.* at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical market place for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 649-650. The availability rates were then "calculated by comparing the number of ready, willing, and able minority and woman-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over $1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 C.F.R. § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and

DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, *citing Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id.* at 652 *citing Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7th Cir. 2007).

Applying Northern Contracting v. Illinois. The district court clarified its prior ruling in 2009 (*see* 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at 652 quoting *Northern Contracting*, 473 F.3d at 721. The district court in Geod followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. *Id.* at 652, *citing Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." *Id.* at 652-653, quoting *Northern Contracting*, 473 F.3d at 722 and *citing* also *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 *citing Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." *Id.* at 653 quoting *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and *citing South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT's DBE program was constitutionally defective, the district court focused on the basis of plaintiffs' argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs' arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 C.F.R. § 26.45. *Id.* The court held that NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT's use. *Id.*

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 654. The court stated that NJT only utilized one of the examples listed in 49 C.F.R. § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id.*

The district court pointed out, however, the regulations state that the "examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id.* at 654, *citing* 46 C.F.R. § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id.* at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id.* at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT's list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id.* at 654, *citing Northern Contracting,* 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, *citing* 49 C.F.R. § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.

The district court then analyzed NJT's division of the adjusted goal into race-conscious and race-neutral portions. *Id.* at 655. The court noted that narrowly tailoring does not require exhaustion

of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id.* at 655. The court agreed with *Western States Paving* that only "when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal." *Id.* at 655, quoting *Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id.* at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 C.F.R. § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id.* at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT's DBE program did not violate the Constitution as it did not exceed its federal authority. *Id.* at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id.* at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id.* at 655-656. The court stated that under *Western States Paving*, a Court must "undertake an as-applied inquiry into whether [the state's] DBE program is narrowly tailored." *Id.* at 656, quoting *Western States Paving*, 407 F.3d at 997.

Applying Western States Paving. The district court then analyzed whether the NJT program was narrowly tailored applying *Western States Paving*. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id.* at 656, *citing Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id.* at 656. However, the court found that the plaintiffs' argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id.* at 656. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE program was assisting with this issue. *Id.* In addition, plaintiff's expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id.*

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id.* at 656. The court held this was insufficient to overcome the consultant's determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id.* at 656.

The district court rejected plaintiffs' argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT's expert identified "prime contracting" as the area in which NJT procurements evidence discrimination. *Id.* at 656. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative but it does require serious, good faith consideration of workable race-neutral

alternatives. *Id.* at 656, *citing Sherbrook Turf*, 345 F.3d at 972 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id.* at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the "relationship of the numerical goals to the relevant labor market." *Id.* at 657. Finally, under the fourth prong, the court addressed the impact on third-parties. *Id.* at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id.* at 657, *citing Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to minimize the burden on non-DBEs. *Id.* at 657, *citing Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id.* at 657, *citing Western States Paving*, 407 F.3d at 955. The court held that the plaintiffs did not provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. *Id.*

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id.* at 657.

13. *Geod Corporation v. New Jersey Transit Corporation, et. seq.* 678 F.Supp.2d 276 (D.N.J. August 20, 2009)

Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 C.F.R. Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT's DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT's disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT's statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a "strong basis in evidence" of discrimination which justified a race- and sex-based program; NJT's program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary

Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at *4. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." *Id.*

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id.* The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender based preferences, as without merit. *Id.* The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id.*

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(9th Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient of federal funds that the program is narrowly tailored. *Id* at *5. In contrast, the NJT relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id.*

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id.*

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id.* at *5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." *Id.*

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id., citing Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id.*

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id.*

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id.* at *5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* at *6, *citing Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id.* at *6, *citing* 49 C.F.R. § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id.* The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT's DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs' argument that the data used in the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id.* at *6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id.* Also, the court stated that "perhaps more importantly, NJT's DBE goal was approved by the USDOT every year from 2002 until 2008." *Id.* at *6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 C.F.R. § 26.45(c). *Id.* at *6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id.*

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of

material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id.* at *6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id.* at *7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT's adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as, DBE utilization based on race, gender and ethnicity. *Id.* A decomposition analysis was also performed. *Id.*

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 C.F.R. § 26.45(d). *Id.*

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender neutral means. The district court concluded that "critically," plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT's DBE goal. *Id.* at *7. The court held that genuine issues of material fact remain only as to whether NJT's adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id.*

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id.* at *7. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id.* at *8.

The court found, however, that what was "gravely critical" about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and "unknown," but did not include an analysis of past discrimination for the ethnic group "Iraqi," which is now a group considered to be a DBE by the NJT. *Id.* Because the disparity report included a category entitled "unknown," the court held a genuine issue of material fact remains as to whether "Iraqi" is legitimately within NJT's defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs' and defendants' Motions for Summary Judgment as to the constitutionality of NJT's DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff's Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the

plaintiff's claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT's Motion for Summary Judgment was granted as to that claim.

14. *South Florida Chapter of the Associated General Contractors v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008)

Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County's implementation of the Federal DBE Program and Broward County's issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by plaintiff in the Motion, namely whether or not the decision in *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005) should govern the Court's consideration of the merits of plaintiffs' claim. 544 F.Supp.2d at 1337. The court identified the threshold legal issue presented as essentially, "whether compliance with the federal regulations is all that is required of Defendant Broward County." *Id.* at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing Northern Contracting v. Illinois*, 473 F.3d 715 (7th Cir. 2007). The plaintiffs disagreed, and contended that the County must take additional steps beyond those explicitly provided for in the federal regulations to ensure the constitutionality of the County's implementation of the Federal DBE Program, as administered in the County, *citing Western States Paving*, 407 F.3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. *Id.* at 1338.

Ninth Circuit Approach: Western States. The district court analyzed the Ninth Circuit Court of Appeals approach in *Western States Paving* and the Seventh Circuit approach in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991) and *Northern Contracting*, 473 F.3d 715. The district court in Broward County concluded that the Ninth Circuit in *Western States Paving* held that whether Washington's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry, and that it was error for the district court in *Western States Paving* to uphold Washington's DBE program simply because the state had complied with the federal regulations. 544 F.Supp.2d at 1338-1339. The district court in Broward County pointed out that the Ninth Circuit in *Western States Paving* concluded it would be necessary to undertake an as-applied inquiry into whether the state's program is narrowly tailored. 544 F.Supp.2d at 1339, *citing Western States Paving*, 407 F.3d at 997.

In a footnote, the district court in *Broward County* noted that the USDOT "appears not to be of one mind on this issue, however." 544 F.Supp.2d at 1339, n. 3. The district court stated that the "United States DOT has, in analysis posted on its Web site, implicitly instructed states and localities outside of the Ninth Circuit to ignore the *Western States Paving* decision, which would tend to indicate that this agency may not concur with the 'opinion of the United States' as represented in *Western States*." 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the *Western States Paving* case that the "state would have to

have evidence of past or current effects of discrimination to use race-conscious goals." 544 F.Supp.2d at 1338, quoting *Western States Paving*.

The Court also pointed out that the Eighth Circuit Court of Appeals in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) reached a similar conclusion as in *Western States Paving*. 544 F.Supp.2d at 1339. The Eighth Circuit in *Sherbrooke*, like the court in *Western States Paving*, "concluded that the federal government had delegated the task of ensuring that the state programs are narrowly tailored, and looked to the underlying data to determine whether those programs were, in fact, narrowly tailored, rather than simply relying on the states' compliance with the federal regulations." 544 F.Supp.2d at 1339.

Seventh Circuit Approach: *Milwaukee County and Northern Contracting.* The district court in Broward County next considered the Seventh Circuit approach. The defendants in Broward County agreed that the County must make a local finding of discrimination for its program to be constitutional. 544 F.Supp.2d at 1339. The County, however, took the position that it must make this finding through the process specified in the federal regulations, and should not be subject to a lawsuit if that process is found to be inadequate. *Id.* In support of this position, the County relied primarily on the Seventh Circuit's approach, first articulated in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), then reaffirmed in Northern Contracting, 473 F.3d 715 (7th Cir. 2007). 544 F.Supp.2d at 1339.

Based on the Seventh Circuit approach, insofar as the state is merely doing what the statute and federal regulations envisage and permit, the attack on the state is an impermissible collateral attack on the federal statute and regulations. 544 F.Supp.2d at 1339-1340. This approach concludes that a state's role in the federal program is simply as an agent, and insofar "as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations." 544 F.Supp.2d at 1340, quoting *Milwaukee County Pavers*, 922 F.2d at 423.

The Ninth Circuit addressed the *Milwaukee County Pavers* case in *Western States Paving*, and attempted to distinguish that case, concluding that the constitutionality of the federal statute and regulations were not at issue in *Milwaukee County Pavers*. 544 F.Supp.2d at 1340. In 2007, the Seventh Circuit followed up the critiques made in *Western States Paving* in the *Northern Contracting* decision. *Id.* The Seventh Circuit in *Northern Contracting* concluded that the majority in *Western States Paving* misread its decision in *Milwaukee County Pavers* as did the Eighth Circuit Court of Appeals in *Sherbrooke*. 544 F.Supp.2d at 1340, *citing Northern Contracting*, 473 F.3d at 722, n.5. The district court in Broward County pointed out that the Seventh Circuit in *Northern Contracting* emphasized again that the state DOT is acting as an instrument of federal policy, and a plaintiff cannot collaterally attack the federal regulations through a challenge to the state DOT's program. 544 F.Supp.2d at 1340, *citing Northern Contracting*, 473 F.3d at 722.

The district court in *Broward County* stated that other circuits have concurred with this approach, including the Sixth Circuit Court of Appeals decision in *Tennessee Asphalt Company v. Farris*, 942 F.2d 969 (6th Cir. 1991). 544 F.Supp.2d at 1340. The district court in *Broward County* held that the Tenth Circuit Court of Appeals took a similar approach in *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992). 544 F.Supp.2d at 1340. The district court in *Broward County* held that these

Circuit Courts of Appeal have concluded that "where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations." 544 F.Supp.2d at 1340-41.

The district court in *Broward County* held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in *Milwaukee County Pavers* and *Northern Contracting* and concluded that "the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program." 544 F.Supp.2d at 1341. It is significant to note that the plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County's actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in *Broward County* held that this type of challenge is "simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations." *Id.*

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.

Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

15. *Klaver Construction, Inc. v. Kansas DOT*, 211 F. Supp.2d 1296 (D. Kan. 2002)

This is another case that involved a challenge to the USDOT Regulations that implement TEA-21 (49 C.F.R. Part 26), in which the plaintiff contractor sought to enjoin the Kansas Department of Transportation ("DOT") from enforcing its DBE Program on the grounds that it violates the Equal Protection Clause under the Fourteenth Amendment. This case involves a direct constitutional challenge to racial and gender preferences in federally-funded state highway contracts. This case concerned the constitutionality of the Kansas DOT's implementation of the Federal DBE Program, and the constitutionality of the gender-based policies of the federal government and the race- and gender-based policies of the Kansas DOT. The court granted the federal and state defendants' (USDOT and Kansas DOT) Motions to Dismiss based on lack of standing. The court held the contractor could not show the specific aspects of the DBE Program that it contends are unconstitutional have caused its alleged injuries.

G. Recent Decisions and Authorities Involving Federal Procurement that may Impact MBE/WBE/DBE Programs

1. *Rothe Development Corp. v. U.S. Department of Defense, et al.*, 545 F.3d 1023 (Fed. Cir. 2008)

Although this case does not involve the Federal DBE Program (49 C.F.R. Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense

contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantages individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense ("DOD") to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the "Price Evaluation Adjustment Program" or "PEA").

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the "analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization." 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, "the evidence must be proven to have been before Congress prior to enactment of the racial classification." The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe,* 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals ("SDBs"). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was "stale," that the plaintiff (Rothe) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works, Adarand*

Constructors, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

2007 Order of the District Court (499 F.Supp.2d 775). In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). Rothe, 499 F.Supp.2d. at 782. plaintiff Rothe did not qualify as an SDB because it was owned by a Caucasian female. Although Rothe was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the "lowest" bidder and was awarded the contract. Id. Rothe claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. Id. at 782-83. The district court's decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf, Western States Paving, Concrete Works, Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government's burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII, Sherbrooke Turf,* and *Western States Paving,* also relied on it in support of their compelling interest holding. *Id.* at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the court's strict scrutiny analysis. First, Rothe's claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce "credible, particularized" evidence to rebut the government's initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government's statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its

compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id.* at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id.* at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id.* at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and "they constitute *prima facie* evidence of a nation-wide pattern or practice of discrimination in public and private contracting." *Id.* at 838-39. The court found that the data used in these six disparity studies is not "stale" for purposes of strict scrutiny review. *Id.* at 839. The court disagreed with Rothe's argument that all the data were stale (data in the studies from 1997 through 2002), "because this data was the most current data available at the time that these studies were performed." *Id.* The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id.* The court declined to adopt a "bright-line rule for determining staleness." *Id.*

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are "stale." *Id.* at n.86. The court also stated that it "accepts the reasoning of the *Appendix*, which the court found stated that for the most part "the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities." *Id.* at 839, quoting *61 Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id.* at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id.* at 871.

The district court found that the data contained in the Appendix, the Benchmark Study, and the Urban Institute Report were "stale," and the court did not consider those reports as evidence of a

compelling interest for the 2006 Reauthorization. *Id.* at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the Appendix to uphold the constitutionality of the Federal DBE Program, *citing* to the decisions in *Sherbrooke Turf, Adarand VII*, and *Western States Paving*. *Id.* at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id.* at 874.

Although the court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with "concrete, particularized" evidence to the contrary. *Id.* at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id.* at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id.* at 877. The court held that the evidence constituted *prima facie* proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id.*

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government's involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id.* The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id.*, quoting *Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;
2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and
3. Over- and under-inclusiveness.

Id. The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id.* The court

concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id.* The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id.* at 880. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." *Id.*

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id.* at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id.* at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

November 4, 2008 decision by the Federal Circuit Court of Appeals. On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a "strong basis in evidence" upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

Strict scrutiny framework. The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is "beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." 545 F.3d. at 1036, quoting *Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, quoting *Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature's decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id.* The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id.*

Compelling interest – strong basis in evidence. The Federal Circuit pointed out that the statistical and anecdotal evidence relief upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, *citing* to *Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id.*

Six state and local disparity studies. The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." 545 F.3d at 1037-1038, quoting *Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether Croson's evidentiary burden is satisfied. 545 F.3d at 1038, quoting *W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress "should be able to rely on the most recently available data so long as that data is reasonably up-to-date." 545 F.3d at 1039. The Federal Circuit affirmed the district court's conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id.*

Before Congress. The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it "must be proven to have been before Congress prior to enactment of the racial classification." 545 F.3d at 1039, *quoting Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id.* at 1040.The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD "which Congress was emphatically not required to make." *Id.* at 1040, footnote 11 (emphasis in original). The Federal Circuit *cited* the *Dean v. City of Shreveport* case that the "government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy." 545 F.3d at 1040, footnote 11 quoting *Dean v. City of Shreveport*, 438 F.3d 448, 445 (5th Cir. 2006).

Methodology. The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, "[a] disparity ratio less than 0.80" — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — "indicates a relevant degree of disparity," and "might support an inference of discrimination." 545 F.3d at 1041, quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and *citing Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11th Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a "crucial question" in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by Rothe, that the six studies misapplied this "touchstone" of *Croson* and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because "the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists." 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id.*

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id.* However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or "relative capacity," of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 quoting *Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id.* at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id.* at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 *citing* to *Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees,

percent of revenue from the private sector and owner experience for industry groupings. *Id.* at 1044-1045.

The court stated, to "be clear," that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id.* at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id.* The court recognized that a minority-owned firm's capacity and qualifications may themselves be affected by discrimination. *Id.* The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id.*

Geographic coverage. The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, "we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest." 545 F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

Anecdotal evidence. The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was not evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in *Croson* that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, *citing Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in Concrete Works noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, quoting *Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and "should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no 'precise

mathematical formula' to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark.'" 545 F.3d at 1049, quoting *W.H. Scott Constr. Co.*, 199 F.3d at 218 n. 11.

Narrowly tailoring. The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — *i.e.*, whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination." 545 F.3d at 1049-1050.

2. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 885 F.Supp.2d 237, (D.D.C. Aug. 15, 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014).

Plaintiff, the DynaLantic Corporation ("DynaLantic"), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense ("DoD"), the Department of the Navy, and the Small Business Administration ("SBA") challenging the constitutionality of Section 8(a) of the Small Business Act (the "Section 8(a) program"), on its face and as applied: namely, the SBA's determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at *1, *37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id.* at *1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD's use of the program, which is reserved for "socially and economically disadvantaged individuals," constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id.* at *1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic's specific industry, defined as the military simulation and training industry. *Id.*

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

The Section 8(a) Program. The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 C.F.R. § 124. "Socially disadvantaged" individuals are persons who have been "subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities." 13

C.F.R. § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). "Economically disadvantaged" individuals are those socially disadvantaged individuals "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged." 13 C.F.R. § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.,* 2012WL 3356813 at *2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id.* at *2 quoting 15 U.S.C. § 631(f)(1)(B)-(c); *see also* 13 C.F.R. § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than $250,000 upon entering the program, and a showing that the individual's income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at *3; *see* 13 C.F.R. § 124.104(c)(2).

Congress has established an "aspirational goal" for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of 5 percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1). *DynaLantic,* at *3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id.* Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id.* DoD has established a goal of awarding approximately 2percent of prime contract dollars through the Section 8(a) program. *DynaLantic,* at *3. The Section 8(a) program allows the SBA, "whenever it determines such action is necessary and appropriate," to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a "sole source" basis (i.e., reserved to one firm) or on a "competitive" basis (i.e., between two or more Section 8(a) firms). *DynaLantic, at *3-4; 13 C.F.R. 124.501(b).*

Plaintiff's business and the simulation and training industry. DynaLantic performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic at *5.*

Compelling interest. The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *DynaLantic,* at *9. First, the government must "articulate a legislative goal that is properly considered a compelling government interest." *Id.* quoting *Sherbrooke Turf v. Minn. DOT.,* 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, "the government must demonstrate 'a strong basis in evidence' supporting its conclusion that race-based remedial action was necessary to further that interest." *DynaLantic,* at *9, quoting *Sherbrooke,* 345 F.3d 969.

After the government makes an initial showing, the burden shifts to DynaLantic to present "credible, particularized evidence" to rebut the government's "initial showing of a compelling interest." *DynaLantic,* at *10 quoting *Concrete Works of Colorado, Inc. v. City and County of Denver,*

321 F.3d 950, 959 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic,* at *10, *citing Rothe Dev. Corp. v. U.S. Dep't of Def.* ("*Rothe III* "), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a "passive participant." *DynaLantic,* at *11. The Court rejected DynaLantic's argument that the federal defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic,* at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic,* at *11, *citing Western States Paving v. Washington State DOT,* 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 quoting *City of Richmond v. J. A. Croson Co., 488 U.S. 469, 492 (1995), and Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of "discriminatory barriers" to "fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts." *DynaLantic,* at *11, quoting *Adarand VII,* 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a "passive participant" in private discrimination in the relevant industries or markets. *DynaLantic,* at *11, *citing Concrete Works IV,* 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic,* at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic,* at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over 30 years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.* The Court then followed the 10th Circuit Court of Appeals' approach in *Adarand VII,* and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic,* at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or "old boy" business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic,* at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic,* at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic,* at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic,* at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic,* at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic,* at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic,* at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.,* 963 F.2d 420 (D.C. Cir. 1992) "require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination." *DynaLantic,* at *26, n. 10.

Analysis: strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic,* at *29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-

conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic,* at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic,* at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic,* at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic,* at *31. The Court stated that the government has therefore "established that there are at least some circumstances where it would be 'necessary or appropriate' for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic,* at *31, *citing* 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff's facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic,* at *31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic,* at *31, n. 13.

Rejection of DynaLantic's rebuttal arguments. The Court held that since the federal defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by defendants fails to demonstrate a compelling governmental interest. *DynaLantic,* at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government's initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic,* at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a "passive participant" when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic,* at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic,* at *35, *citing Concrete Work IV,* 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id, citing Croson,* 488 U.S. 500. Accordingly, the Court stated

that DynaLantic's claim that the government must independently verify the evidence presented to it is unavailing. *Id. DynaLantic,* at *35.

Also in terms of DynaLantic's arguments about flaws in the evidence, the Court noted that defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic,* at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id.* The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic,* at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic,* at *35. In short, the Court found that DynaLantic's "general criticism" of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic,* at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic,* at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic,* at *36.

Facial challenge: conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different areas. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic,* at *37. Second, it provided "forceful" evidence of discriminatory barriers to minority business development. *Id.* Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id.*

As-applied challenge. *DynaLantic* also challenged the SBA and DoD's use of the Section 8(a) program as applied: namely, the agencies' determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic,* at *37. Significantly, the Court points out that the federal defendants "concede that they do not have evidence of discrimination in this industry." *Id.* Moreover, the Court points out that the federal defendants admitted that there "is no Congressional report, hearing or finding that references,

discusses or mentions the simulation and training industry." *DynaLantic,* at *38. The federal defendants also admit that they are "unaware of any discrimination in the simulation and training industry." *Id.* In addition, the federal defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic,* at *38.

The federal defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic,* at *38. The Court concludes that the federal defendants' position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court's decision in *Croson,* as well as the Federal Circuit's decision in *O'Donnell Construction Company,* which adopted *Croson's* reasoning. *DynaLantic,* at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic,* at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson's* evidentiary requirement to show an inference of discrimination. *DynaLantic,* at *39, *citing Croson,* 488 U.S. 501. The Court rejects the federal government's position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic,* at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic,* at *40, *citing Cortez III Service Corp. v. National Aeronautics & Space Administration,* 950 F.Supp. 357 (D.D.C. 1996). In *Cortez,* the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic,* at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand. DynaLantic,* at *40.

The Court recognized that legislation considered in *Croson, Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic,* at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic,* at *40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic,* at *40.

Narrowly tailoring. In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic,* at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic,* at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic,* at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic,* at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic,* at *44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic,* at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic,* at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic,* at *45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic,* at *46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than 5 percent of contract dollars, are facially constitutional. *DynaLantic,* at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to 2 to 5 percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic,* at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic,* at *48. The Court concluded that the government is not required to eliminate the

burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds $250,000 regardless of race. *Id.*

Conclusion. The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic,* at *51. Accordingly, the Court granted the federal defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the Plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

Appeals voluntarily dismissed, and stipulation and agreement of settlement approved and ordered by District Court.. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United Status and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the district court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the federal defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the federal defendants agreed to pay plaintiff the sum of $1,000,000.00; and (3) the Federal defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The district court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

3. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 503 F. Supp.2d 262 (D.D.C. 2007)

DynaLantic Corp. involved a challenge to the DOD's utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program ("8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. *Id.* Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id.* at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id.* at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id.* at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id.* at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government's proffered "compelling government interest," the court must consider the evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id.* The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rothe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties' Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id.* at 267.

APPENDIX C.
General Approach to Availability Analysis

The study team used a *custom census* approach to analyze the availability of minority- and woman-owned businesses for construction; professional services; and goods and support services prime contracts and subcontracts that the Indiana Department of Transportation (INDOT) awarded between July 1, 2009 and June 30, 2013. Appendix C expands on the information presented in Chapter 5 to describe the study team's:

A. General approach to collecting availability information;

B. Development of the business establishments list;

C. Development of the survey instrument;

D. Execution of surveys; and

E. Additional considerations related to measuring availability.

A. General Approach to Collecting Availability Information

BBC Research & Consulting (BBC) contracted with Engaging Solutions to conduct telephone surveys with thousands of business establishments in Indiana, which BBC identified as the *relevant geographic market area* for INDOT contracting. Business establishments that Engaging Solutions surveyed were businesses with locations in Indiana that the study team identified as doing work in fields closely related to the types of contracts that INDOT awarded during the study period. The study team began the survey process by determining the subindustries for each relevant INDOT contract element and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries.[1] The study team then collected information about local business establishments that D&B listed as having their primary lines of business within those work specializations. Rather than drawing a sample of business listings from D&B, the study team attempted to contact every business establishment listed under relevant work specialization codes.[2]

As part of the telephone survey effort, the study team attempted to contact 27,384 business establishments in the local marketplace that do work that is relevant to INDOT contracting. That total included 14,673 construction establishments; 8,325 professional services establishments; 3,448 goods and support services establishments; and 938 establishments with a primary line of work outside of the three contracting areas relevant to the disparity study (which were not

---

[1] D&B has developed 8-digit industry codes that provide more precise definitions of business specializations than the 4-digit Standard Industrial Classification (SIC) codes or the North American Industry Classification System (NAICS) codes that the federal government has prepared.

[2] Because D&B organizes its database by *business establishment* and not by "business" or "firm," BBC purchased business listings in that fashion. Therefore, in many cases, the study team purchased information about multiple locations of a single business and called all of those locations. BBC's method for consolidating information for different establishments that were associated with the same business is described later in Appendix C.

considered further as part of the availability analysis). The study team was able to successfully contact 10,085 of those establishments—48 percent of the establishments with valid phone listings (6,185 business establishments did not have valid phone listings). Of business establishments that the study team contacted successfully, 2,200 establishments completed availability surveys.

B. Development of the Business Establishments List

The study team did not expect every business establishment that it contacted to be potentially available for INDOT work. The study team's goal was to develop—with a high degree of precision—unbiased estimates of the availability of minority- and woman-owned businesses for the types of contracts that INDOT awarded during the study period. In fact, for some subindustries, BBC anticipated that relatively few businesses would be available to perform that type of work for INDOT.

In addition, BBC did not design the research effort so that the study team would contact every local business possibly performing construction; professional services; or goods and support services work. To do so would have required the study team to include subindustries that are only marginally related or unrelated to the types of contracts that INDOT awarded during the study period. Moreover, some business establishments working in relevant subindustries may have been missing from corresponding D&B or other listings.

BBC determined the types of work involved in INDOT prime contracts by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period. Figure C-1 lists the 8-digit work specialization codes within construction; professional services; and goods and support services that the study team determined were most related to the contract dollars that INDOT awarded during the study period and that BBC considered as part of the availability analysis. The study team grouped those specializations into distinct subindustries, which are presented as headings in Figure C-1.

C. Development of the Survey Instrument

BBC drafted an availability survey instrument to collect business information from construction; professional services; and goods and support services business establishments in Indiana. As an example, the survey instrument that the study team used with construction establishments is presented at the end of Appendix C. The study team modified the construction survey instrument slightly for use with establishments working in other industries in order to reflect terms more commonly used in those industries (e.g., the study team substituted the words "prime contractor" and "subcontractor" with "prime consultant" and "subconsultant" when surveying professional services establishments).[3]

Survey structure. The availability survey included 17 sections, and Engaging Solutions attempted to cover all sections with each business establishment that they successfully contacted and that was willing to complete a survey. Surveyors did not know the race/ethnicity or gender of business owners when calling business establishments.

[3] BBC also developed a fax and e-mail version of the survey instrument for business establishments that reported a preference to complete the survey in those formats.

Figure C-1.
Subindustries included in the availability analysis

Industry Code	Industry Description
Construction	
Ceiling and floor contractor	
1752-0000	Floor laying and floor work, nec
1771-9903	Flooring contractor
Concrete and related products	
3272-0000	Concrete products, nec
3273-0000	Ready-mixed concrete
Concrete work	
1771-0000	Concrete work
1771-0200	Curb and sidewalk contractors
Electrical equipment and supplies	
3569-0204	Sprinkler systems, fire: automatic
3669-0206	Traffic signals, electric
3674-0000	Semiconductors and related devices
3825-0000	Instruments to measure electricity
5063-0000	Electrical apparatus and equipment
5063-0206	Electrical supplies, nec
5063-0502	Burglar alarm systems
5063-0504	Signaling equipment, electrical
Electrical work	
1731-0000	Electrical work
1731-0300	Communications specialization
1731-9903	General electrical contractor
Excavation	
1629-9902	Earthmoving contractor
1794-0000	Excavation work
1794-9901	Excavation and grading, building construction
Fencing, guardrails and signs	
1799-9912	Fence construction
Floor coverings	
5023-0400	Floor coverings
5713-0000	Floor covering stores
Heavy construction	
1611-0000	Highway and street construction
1611-0101	Guardrail construction, highways
1611-0200	Surfacing and paving
1611-0204	Highway and street paving contractor
1611-0205	Resurfacing contractor
1611-9902	Highway and street maintenance
1611-9903	Highway reflector installation
1622-0000	Bridge, tunnel, and elevated highway construction
1622-9901	Bridge construction
1622-9902	Highway construction, elevated
1771-0301	Blacktop (asphalt) work
Heavy construction equipment	
3531-0000	Construction machinery
5082-0100	Road construction equipment
5082-0102	Road construction and maintenance machinery
5082-0308	Tractors, construction
7353-9902	Earth moving equipment, rental, or leasing
Industrial equipment and machinery	
3537-0000	Industrial trucks and tractors
3585-0000	Refrigeration and heating equipment
3599-0000	Industrial machinery, nec
3691-0000	Storage batteries
3713-0207	Dump truck bodies
3822-0000	Environmental controls
3823-0000	Process control instruments
5083-0000	Farm and garden machinery
5083-0200	Lawn and garden machinery and equipment

Figure C-1.
Subindustries included in the availability analysis (continued)

Construction (continued)

Industrial equipment and machinery (continued)

5084-0000	Industrial machinery and equipment
5084-0800	Materials handling machinery
5084-0903	Compressors, except air conditioning
5085-0000	Industrial supplies
5085-0400	Fasteners and fastening equipment
5099-0300	Safety equipment and supplies
7699-0504	Industrial machinery and equipment repair

Landscape services

0781-0200	Landscape services
0782-0000	Lawn and garden services
0782-0203	Lawn care services
0782-9902	Highway lawn and garden maintenance services
0782-9903	Landscape contractors

Masonry, drywall and stonework

1741-0000	Masonry and other stonework
1742-0000	Plastering, drywall, and insulation
1742-0101	Drywall
5211-0500	Masonry materials and supplies

Other construction materials

2448-0201	Pallets, wood
2951-0000	Asphalt paving mixtures and blocks
2951-0201	Asphalt and asphaltic paving mixtures (not from refineries)
3443-0000	Fabricated plate work (boiler shop)
3531-0401	Asphalt plant, including gravel-mix type
5039-0200	Glass construction materials
5074-0000	Plumbing and hydronic heating supplies
5074-0300	Plumbing fittings and supplies
5075-0000	Warm air heating and air conditioning
5085-9908	Mill supplies
5211-0000	Lumber and other building materials
5231-0000	Paint, glass, and wallpaper stores
5231-0200	Paint and painting supplies
7359-9911	Tool rental

Other construction services

1796-9901	Elevator installation and conversion
1799-0000	Special trade contractors, nec
1799-0801	Asbestos removal and encapsulation
3534-0100	Elevators and equipment
5084-0803	Elevators
7359-9912	Work zone traffic equipment (flags, cones, barrels, etc.)
7389-9921	Flagging service (traffic control)
7699-2501	Elevators: inspection, service, and repair

Painting

1721-0000	Painting and paper hanging
1721-0100	Residential painting
1721-0200	Commercial painting
1721-0201	Exterior commercial painting contractor
1721-0300	Industrial painting

Plumbing and HVAC

1711-0000	Plumbing, heating, air-conditioning
1711-0200	Plumbing contractors
1711-0301	Fire sprinkler system installation
1711-0400	Heating and air conditioning contractors
1711-0401	Mechanical contractor
1711-0405	Warm air heating and air conditioning contractor
7623-9901	Air conditioning repair

Residential construction

1522-0101	Apartment building construction
1799-0600	Home/office interiors finishing, furnishing and remodeling

Roofing

1761-0000	Roofing, siding, and sheetmetal work
1761-0100	Roofing and gutter work
1761-0103	Roofing contractor

Structural metals

3441-0000	Fabricated structural metal

Figure C-1.
Subindustries included in the availability analysis (continued)

Construction (continued)	
Structural metals (continued)	
3444-0000	Sheet metalwork
3448-0000	Prefabricated metal buildings and components
3449-0101	Bars, concrete reinforcing: fabricated steel
5051-0216	Steel
Structural steel and building construction	
1521-0000	Single-family housing construction
1541-0000	Industrial buildings and warehouses
1541-9905	Industrial buildings, new construction, nec
1542-0000	Nonresidential construction, nec
1542-0100	Commercial and office building contractors
1542-0101	Commercial and office building, new construction
1542-0103	Commercial and office buildings, renovation and repair
1542-9901	Custom builders, non-residential
1542-9903	Institutional building construction
1751-0000	Carpentry work
1751-9902	Lightweight steel framing (metal stud) installation
1791-0000	Structural steel erection
Trucking, hauling and storage	
4212-0000	Local trucking, without storage
4213-9903	Contract haulers
4215-9903	Package delivery, vehicular
4731-0000	Freight transportation arrangement
Water, sewer, and utility lines	
1623-0000	Water, sewer, and utility lines
1623-0203	Telephone and communication line construction
1623-0302	Sewer line construction
1623-9903	Pipe laying construction
1623-9906	Underground utilities contractor
1629-0400	Land preparation construction
1629-0505	Waste water and sewage treatment plant construction
Wrecking and demolition	
1795-0000	Wrecking and demolition work
1795-9901	Concrete breaking for streets and highways
1795-9902	Demolition, buildings and other structures
Professional Services	
Advertising, marketing and public relations	
3993-0100	Electric signs
7311-0000	Advertising agencies
7331-0000	Direct mail advertising services
7336-0103	Graphic arts and related design
7389-0300	Advertising, promotional, and trade show services
Architectural and design services	
0781-0000	Landscape counseling and planning
7389-0600	Interior design services
7389-1800	Design services
8712-0000	Architectural services
8712-0100	Architectural engineering
Computer systems and services	
7378-0000	Computer maintenance and repair
7378-9901	Computer and data processing equipment repair/maintenance
7379-0000	Computer related services, nec
7379-0100	Computer related maintenance services
7379-0200	Computer related consulting services
Construction management	
8741-9902	Construction management
Educational services	
8299-0200	Educational services
8748-9902	Educational consultant

Figure C-1.
Subindustries included in the availability analysis (continued)

Professional Services (continued)

Business services and consulting

7361-0101	Executive placement
7389-0000	Business services, nec
7389-9966	Document storage service
7389-9999	Business Activities at Non-Commercial Site
8741-0100	Business management
8742-0000	Management consulting services
8742-0100	Industrial and labor consulting services
8742-0102	Industrial consultant
8742-0300	Marketing consulting services
8742-0406	Real estate consultant
8742-0500	Business planning and organizing services
8742-0502	Corporation organizing consultant
8742-9901	Administrative services consultant
8742-9905	Management information systems consultant
8748-0302	Telecommunications consultant
8748-0400	Systems analysis and engineering consulting services

Human resources and job training services

7361-0000	Employment agencies
7363-0103	Temporary help service
8742-0200	Human resource consulting services

IT and data services

7371-0000	Custom computer programming services
7371-0100	Custom computer programming services
7371-0101	Computer software systems analysis and design, custom
7371-0301	Computer software development
7373-0000	Computer integrated systems design
7373-0200	Systems integration services
7373-0201	Local area network (LAN) systems integrator
7373-0202	Office computer automation systems integration
7374-0000	Data processing and preparation
7374-9901	Data entry service
7374-9902	Data processing service
7375-0000	Information retrieval services
8748-0402	Systems engineering consultant, ex. computer or professional

Engineering

8711-0000	Engineering services
8711-0202	Mechanical engineering
8711-0400	Construction and civil engineering
8711-0402	Civil engineering
8711-0404	Structural engineering
8711-9906	Energy conservation engineering
8711-9909	Professional engineer

Environmental services and transportation planning

8742-0410	Transportation consultant
8748-9905	Environmental consultant
8999-0700	Earth science services

Finance and accounting

8721-0000	Accounting, auditing, and bookkeeping
8742-9908	Financial consultant

Medical testing, laboratories, and pharmaceutical services

8071-0000	Medical laboratories
8082-0000	Home health care services
8099-0000	Health and allied services, nec
8099-0100	Blood related health services
8099-0200	Physical examination and testing services
8099-0201	Health screening service
8099-0202	Hearing testing service
8099-0203	Physical examination service, insurance
8099-9905	Medical services organization
8399-9905	Health and welfare council

Other professional services

8731-0000	Commercial physical research
8731-0302	Environmental research
8732-0108	Research services, except laboratory

Testing services

0711-9906	Soil testing services

Figure C-1.
Subindustries included in the availability analysis (continued)

Professional Services (continued)

Testing services (continued)

7389-0200	Inspection and testing services
8734-0000	Testing laboratories
8744-9904	Environmental remediation
8748-0100	Testing services

Surveying and mapmaking

8713-0000	Surveying services

Goods and Support Services

Automobiles

2531-0303	Seats, automobile
5012-0202	Busses
5511-0000	New and used car dealers
5511-9901	Automobiles, new and used
5599-9903	Golf cart, powered
7538-0000	General automotive repair shops

Cleaning and janitorial services

7217-0000	Carpet and upholstery cleaning
7342-0200	Pest control services
7349-0000	Building maintenance services, nec
7349-0100	Building and office cleaning services
7349-0101	Building cleaning service
7349-0104	Janitorial service, contract basis
7349-9902	Cleaning service, industrial or commercial

Cleaning and janitorial supplies

5087-0300	Cleaning and maintenance equipment and supplies
5087-0304	Janitors' supplies

Communications equipment

3661-9908	Fiber optics communications equipment
3663-0000	Radio and t.v. communications equipment
3663-9906	Mobile communication equipment
5065-0200	Communication equipment
5065-0204	Intercommunication equipment, electronic
5065-9903	Security control equipment and systems

Communications equipment (continued)

5099-0500	Video and audio equipment
5999-0601	Audio-visual equipment and supplies
5999-0603	Telephone equipment and systems

Farm and garden equipment and supplies

5191-0000	Farm supplies
5261-0100	Lawn and garden equipment

Furniture

2522-0400	Office desks and tables, except wood
2531-0000	Public building and related furniture
2531-0100	School furniture
2531-0300	Vehicle furniture
2531-0400	Stadium furniture
2531-0402	Stadium seating
2531-9902	Benches for public buildings
2531-9908	Picnic tables or benches, park
3499-9913	Furniture parts, metal
3821-0000	Laboratory apparatus and furniture
5021-0000	Furniture
5021-0106	Office furniture, nec
5021-0200	Household furniture
5712-9904	Office furniture

Gambling and lottery services

7999-1300	Gambling and lottery services

Figure C-1.
Subindustries included in the availability analysis (continued)

Goods and Support Services (continued)

Industrial chemicals

2813-0000	Industrial gases
2821-0000	Plastics materials and resins
2842-0000	Polishes and sanitation goods
2891-0000	Adhesives and sealants
2892-0000	Explosives
2899-0000	Chemical preparations, nec
2899-9943	Salt
5169-0000	Chemicals and allied products, nec

Office equipment

3555-0000	Printing trades machinery
3579-0100	Mailing, letter handling, and addressing machines
5044-0000	Office equipment
5044-0200	Copying equipment
5962-0000	Merchandising machine operators

Office supplies

3953-0000	Marking devices
5111-0000	Printing and writing paper
5112-0000	Stationery and office supplies
5112-9907	Office supplies, nec
5199-9918	Packaging materials
5943-0000	Stationery stores

Other goods

2531-0401	Bleacher seating, portable
3949-0000	Sporting and athletic goods, nec
5099-0000	Durable goods, nec
5099-0100	Firearms and ammunition, except sporting
5099-0301	Fire extinguishers
5699-0102	Uniforms

Other services

2395-0200	Embroidery and art needlework
4111-0101	Bus line operations
4131-0000	Intercity and rural bus transportation
4141-0000	Local bus charter service

Other services (continued)

8999-0000	Services, nec

Petroleum and petroleum products

2911-0000	Petroleum refining
2992-0000	Lubricating oils and greases
5171-0000	Petroleum bulk stations and terminals
5171-9901	Petroleum bulk stations
5172-0203	Gasoline
5984-0000	Liquefied petroleum gas dealers
5984-9902	Liquefied petroleum gas, delivered to customers' premises

Printing and copying

2752-0000	Commercial printing, lithographic
2752-0101	Offset printing
3993-0000	Signs and advertising specialties
5199-9901	Advertising specialties
7334-0000	Photocopying and duplicating services
7334-9901	Blueprinting service

Restaurant and hotel equipment

3632-0000	Household refrigerators and freezers
5046-0300	Commercial cooking and food service equipment
5046-0306	Restaurant equipment and supplies, nec

Security guard services

7381-0100	Guard services
7381-0105	Security guard service

Security services

3699-0502	Security control equipment and systems
7382-0000	Security systems services
7382-9901	Burglar alarm maintenance and monitoring

Vehicle parts and supplies

3711-0000	Motor vehicles and car bodies
5531-0000	Auto and home supply stores
5531-0103	Automotive parts

Source: BBC Research & Consulting.

1. Identification of purpose. The surveys began by identifying INDOT as one of the survey sponsors and describing the purpose of the study (e.g., "developing a list of companies interested in providing construction-related services for state or local government agencies or for public colleges in Indiana").

2. Verification of correct business name. The surveyor verified that he or she had reached the correct business, and if not, inquired about the correct contact information for the correct business. When the business name was not correct, surveyors asked if the respondent knew how to contact the business. Engaging Solutions followed up with the desired company based on the new contact information (see areas "X" and "Y" of the availability survey instrument at the end of Appendix C).

3. Verification of work related to relevant projects. The surveyor asked whether the organization does work or provides materials related to construction, maintenance, or design (Question A1). Surveyors continued the survey with businesses that responded "yes" to that question.[4]

4. Verification of for-profit business status. The surveyor asked whether the organization was a for-profit business as opposed to a government or nonprofit entity (Question A2). Surveyors continued the survey with businesses that responded "yes" to that question.

5. Confirmation of main lines of business. Businesses confirmed their main lines of business according to D&B (Question A4a). If D&B's work specialization codes were incorrect, businesses then described their main lines of business (Question A4b). After the survey was complete, as necessary, BBC coded new information on main lines of business into appropriate 8-digit D&B work specialization codes.

6. Sole location or multiple locations. Because the study team surveyed business establishments and not businesses or firms, the surveyor asked business owners or managers if their businesses had other locations (Question A5) and whether their establishments were affiliates or subsidiaries of other businesses (Questions A6 and A7).

7. Past bids or work with government agencies and private sector organizations. The surveyor asked about bids and work on past government and private sector contracts. Engaging Solutions asked those questions in connection with both prime contracts and subcontracts (Questions B1 through B8).[5]

8. Qualifications and interest in future work. The surveyor asked about businesses' qualifications and interest in future work with state or local government agencies or public colleges in Indiana. Engaging Solutions asked those questions in connection with both prime contracts and subcontracts (Questions B9 through B12).[6]

---

[4] Goods and support services businesses were not asked questions about whether they work or provides materials related to construction, maintenance, or design.

[5] Goods and support services businesses were not asked questions about subcontract work.

[6] Goods and support services businesses were not asked questions about subcontract work.

9. Airport security and insurance. The surveyor asked about businesses' willingness and ability to meet the Indianapolis Airport Authority's (IAA's) security and insurance requirements. The study team used that information to assess availability as part of IAA's disparity study but not as part of INDOT's disparity study (Questions B13 and B14).[7]

10. Geographic areas. The surveyor asked questions about the geographic regions within Indiana in which businesses serve customers (Questions C1a through C4d).

11. Year established. The surveyor asked businesses to identify the approximate year in which they were established (Question D1).

12. Largest contracts. The study team asked businesses to identify the value of the largest contract on which they had bid on or had been awarded during the past five years. Engaging Solutions asked those questions for both prime contracts and subcontracts (Questions D2 through D4).[8]

13. Apprenticeship. The surveyor asked construction businesses about their willingness to participate in certified apprenticeship programs. The study team used that information to assess availability as part of Ivy Tech Community College's disparity study but not as part of INDOT's disparity study (Questions D5 through D7).

14. Ownership. The surveyor asked whether businesses were at least 51 percent owned and controlled by women and/or minorities. If businesses indicated that they were minority-owned, they were also asked about the race/ethnicity of their business' ownership (Questions E1 through E3). The study team confirmed that information through several other data sources including:

- INDOT's directory of certified Disadvantaged Business Enterprises (DBEs);
- The Indiana Department of Administration's directory of certified minority- and woman-owned business enterprises (MBE/WBEs);
- INDOT and other participating entities' vendor data;
- INDOT staff review; and
- Information from D&B and other sources.

When information about race/ethnicity or gender of ownership conflicted between sources, the study team reconciled that information through follow-up telephone calls with the businesses.

15. Business revenue. The surveyor asked several questions about the size of businesses in terms of their revenues. For businesses with multiple locations, the Business Revenue section also asked about their revenues and number of employees across all locations (Questions F1 through F3).

---

[7] Goods and support services businesses were not asked questions about IAA's security and insurance requirements.

[8] Goods and support services businesses were not asked questions about subcontract work.

16. Potential barriers in the marketplace. The surveyor asked an open-ended question concerning general insights about conditions in the local marketplace (Question G1). In addition, the survey included a question asking whether respondents would be willing to participate in a follow-up interview about conditions in the local marketplace (Question G2).

17. Contact information. The survey concluded with questions about the participant's name and position with the organization (Questions H1 and H2).

D. Execution of Surveys

BBC held planning sessions both in person and via telephone with Engaging Solutions executives and surveyors prior to conducting the availability surveys. Engaging Solutions conducted all surveys in 2015. Engaging Solutions programmed the surveys, conducted them via telephone, and provided BBC with weekly data reports. To minimize non-response, Engaging Solutions made up to five attempts during different times of the day and on different days of the week to successfully reach each business establishment. Engaging Solutions attempted to survey an available company representative such as the owner, manager, chief financial officer, or other key official who could provide accurate and detailed responses to survey questions.

Establishments that the study team successfully contacted. Figure C-2 presents the disposition of the 27,384 business establishments that the study team attempted to contact for availability surveys and how that number resulted in the 10,085 establishments that the study team was able to successfully contact.

Figure C-2. Disposition of attempts to survey business establishments

Note:

Engaging Solutions made up to five attempts to complete a survey with each establishment.

Source:

BBC Research & Consulting availability analysis.

	Number of firms	Percent of business listings
Beginning list	27,384	
Less duplicate phone numbers	65	
Less non-working phone numbers	3,818	
Less wrong number/business	2,302	
Unique business listings with working phone numbers	21,199	100.0 %
Less no answer	8,754	41.3
Less could not reach responsible staff member	404	1.9
Less language barrier	37	0.2
Less unreturned fax/email	1,919	9.1
Establishments successfully contacted	**10,085**	**47.6 %**

Non-working or wrong phone numbers. Some of the business listings that the study team purchased from D&B and that Engaging Solutions attempted to contact were:

- Duplicate phone numbers (65 listings);
- Non-working phone numbers (3,818 listings); or
- Wrong numbers for the desired businesses (2,302 listings).

Some non-working phone numbers and wrong numbers resulted from businesses going out of business or changing their names and phone numbers between the time that D&B listed them and the time that the study team attempted to contact them.

Working phone numbers. As shown in Figure C-2, there were 21,199 business establishments with working phone numbers that Engaging Solutions attempted to contact. Engaging Solutions was unsuccessful in contacting many of those businesses for various reasons:

- Engaging Solutions could not reach anyone after five attempts at different times of the day and on different days of the week for 8,754 establishments.
- Engaging Solutions could not reach a responsible staff member after five attempts at different times of the day on different days of the week for 404 establishments.
- Engaging Solutions could not conduct the availability survey due to language barriers for 37 establishments.
- Engaging Solutions sent hardcopy fax or e-mail availability surveys upon request but did not receive completed surveys from 1,919 establishments.

After taking those unsuccessful attempts into account, Engaging Solutions was able to successfully contact 10,085 business establishments, or about 48 percent of establishments with valid phone listings.

Establishments included in the availability database. Figure C-3 presents the disposition of the 10,085 business establishments that Engaging Solutions successfully contacted and how that number resulted in the 1,366 businesses that the study team included in the availability database and that the study team considered available for INDOT and other entity work.

Figure C-3.
Disposition of successfully contacted business establishments

	Number of Establishments
Establishments successfully contacted	10,085
Less establishments not interested in discussing availability for State/SEI work	7,885
Establishments that completed interviews about firm characteristics	2,200
Less no relevant work	32
Less not a for-profit business	209
Less line of work outside scope	49
Less no past bid/award	290
Less not interest in future work	150
Less established after study period	39
Less multiple establishments	65
Establishments potentially available for entity work	**1,366**

Source: BBC Research & Consulting availability analysis.

Establishments not interested in discussing availability for INDOT work. Of the 10,085 business establishments that the study team successfully contacted, 7,885 establishments were not interested in discussing their availability for INDOT work. In total, 2,200 (22%) successfully-contacted business establishments completed availability surveys.

Establishments available for entity work. The study team only deemed a portion of the business establishments that completed availability surveys as available for the prime contracts and subcontracts that INDOT and other entities participating in the disparity study awarded during the study period. The study team excluded many of the business establishments that completed surveys from the availability database for various reasons:

- BBC excluded 32 establishments that indicated that their businesses were not involved in relevant contracting work.
- Of the establishments that completed availability surveys, 209 indicated that they were not a for-profit business. The survey ended when respondents reported that their establishments were not for-profit businesses.
- BBC excluded 49 establishments that indicated that their businesses were involved in construction; professional services; or goods and support services work but reported that their main lines of business were outside of the study scope.
- BBC excluded 290 establishments that reported not having bid on or been awarded contracts within the past five years.
- BBC excluded 150 establishments that reported not being qualified or interested in either prime contracting or subcontracting opportunities with state or local government agencies in Indiana.
- BBC excluded 39 business establishments that reported being established in 2014 or later. Those business establishments would not have been available for contract elements that INDOT or other entities awarded during the study period.
- Sixty-five establishments represented different locations of the same businesses. Prior to analyzing results, BBC combined responses from multiple locations of the same business into a single data record.

After those exclusions, BBC compiled a database of 1,366 businesses that were considered potentially available for INDOT and other entity work.

Coding responses from multi-location businesses. Responses from different locations of the same business were combined into a single summary data record according to several rules:

- If any of the establishments reported bidding or working on a contract within a particular subindustry, the study team considered the business to have bid or worked on a contract in that subindustry.
- The study team combined the different roles of work that establishments of the same business reported (i.e., prime contractor or subcontractor) into a single response corresponding to the appropriate subindustry. For example, if one establishment reported that it works as a prime contractor and another establishment reported that it works as a

subcontractor, then the study team considered the business as available for both prime contracts and subcontracts within the relevant subindustry.[9]

- Except when there were large discrepancies among individual responses regarding establishment dates, BBC used the earliest founding date that establishments of the same business provided. In cases of large discrepancies, BBC followed up with the business establishments to obtain accurate establishment date information.
- BBC considered the largest contract that any establishments of the same business reported having bid or worked on as the business' relative capacity (i.e., the largest contract for which the business could be considered available).
- BBC considered the largest revenue total that any establishments of the same business reported as the business' revenue cap (for purposes of determining status as a potential DBE).
- BBC determined the number of employees for businesses by calculating the mode or the mean of responses from its establishments.
- BBC coded businesses as minority- or woman-owned if the majority of its establishments reported such status.

E. Additional Considerations Related to Measuring Availability

The study team made several additional considerations related to its approach to measuring availability to ensure that the study team's estimates of the availability of minority- and woman-owned businesses for INDOT work were as accurate as possible.

Not providing a count of all businesses available for INDOT work. The purpose of the availability analysis was to provide precise and representative estimates of the percentage of INDOT contracting dollars for which minority- and woman-owned businesses are available. The availability analysis did not provide a comprehensive listing of every business that could be available for INDOT work and should not be used in that way. Federal courts have approved BBC's use of that approach to measuring availability. In addition, federal regulations, such as the United States Department of Transportation's (USDOT's) "Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program" recommend similar approaches to measuring availability for agencies implementing minority- and woman-owned owned business programs.[10]

Not basing the availability analysis on MBE/WBE or DBE directories, prequalification lists, or bidders lists. Federal guidance, such as USDOT guidance for determining the availability of minority- and woman-owned businesses, recommends dividing the number of businesses in an entity's certification directory by the total number of businesses in the marketplace, as reported in U.S. Census data. As another option, USDOT suggests using a list of prequalified businesses or a bidders list to estimate the availability of minority- or

---

[9] Goods and support services businesses were not asked questions about subcontract work.

[10] Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program, http://www.osdbu.dot.gov/dbeprogram/tips.cfm.

woman-owned businesses for an entity's prime contracts and subcontracts. The primary reason why the study team rejected such approaches when measuring the availability of minority- and woman-owned businesses for INDOT work is that dividing a simple count of certified businesses by the total number of businesses does not provide the data on business characteristics that the study team desired for the disparity study. The methodology applied in this study takes a custom census approach to measuring availability and adds several layers of refinement to a simple head count approach. For example, the surveys provided data on qualifications, relative capacity, and interest in INDOT work for each business, which allowed the study team to take a more refined approach to measuring availability. Court cases involving implementations of minority- and woman-owned business programs have approved the use of such approaches to measuring availability.[11]

Using D&B lists as the sample frame. BBC began its custom census approach of measuring availability with D&B business lists. D&B does not require businesses to pay a fee to be included in its listings—it is completely free to listed businesses. D&B provides the most comprehensive private database of business listings in the United States. Even so, the database does not include all establishments operating in Indiana:

- There can be a lag between formation of a new business and inclusion in D&B, meaning that the newest businesses may be underrepresented in the sample frame. Based on information from BBC's survey effort, newly formed businesses are more likely to be minority- or woman-owned, suggesting that minority- and woman-owned businesses might be underrepresented in the final availability database.
- Although D&B includes home-based businesses, those businesses are more difficult to identify and are thus somewhat less likely than other businesses to be included in D&B listings. Small, home-based businesses are more likely than large businesses to be minority- or woman-owned, which again suggests that minority- and woman-owned businesses might be underrepresented in the final availability database.

BBC is not able to quantify the degree to which minority- and woman-owned businesses were underrepresented in the final availability database, if at all. However, estimates presented in the disparity study should be considered conservative estimates of the availability of minority- and woman-owned businesses. Note that there are no alternative business listings that would better address such issues.

Selection of specific subindustries. Defining subindustries based on specific work specialization codes (e.g., NAICS or D&B industry codes) is a standard step in analyzing businesses in an economic sector. Government and private sector economic data are typically organized according to such codes. As with any such research, there are limitations when choosing specific D&B work specialization codes to define sets of establishments to be surveyed. For example, it was not possible for BBC to include all businesses possibly doing work in

[11] Note that BBC used MBE/WBE and DBE certification directories and other sources of information to confirm information about the race/ethnicity and gender of business ownership that it obtained from availability surveys.

relevant industries without conducting surveys with nearly every business in the relevant geographic market area.

In addition, some industry codes are imprecise and overlap with other business specialties. Some businesses span several types of work, even at the 8-digit level of specificity. That overlap can make classifying businesses into single main lines of business difficult and imprecise. When the study team asked business owners and managers to identify main lines of business, they often gave broad answers. For those and other reasons, BBC collapsed many of the work specialization codes into broader subindustries to more accurately classify businesses in the availability database.

Non-response bias. An analysis of non-response bias considers whether businesses that were not successfully surveyed are systematically different from those that were successfully surveyed and included in the final data set. There are opportunities for non-response bias in any survey effort. The study team considered the potential for non-response bias due to:

- Research sponsorship;
- Work specializations; and
- Language barriers.

Research sponsorship. Surveyors introduced themselves by identifying INDOT as one of the survey sponsors, because businesses may be less likely to answer somewhat sensitive business questions if the surveyor was unable to identify the sponsor. In past survey efforts—particularly those related to availability studies—BBC has found that identifying the sponsor substantially increases response rate.

Work specializations. Businesses in highly mobile fields, such as trucking, may be more difficult to reach for availability surveys than businesses more likely to work out of fixed offices (e.g., engineering businesses). That assertion suggests that response rates may differ by work specialization. Simply counting all surveyed businesses across work specializations to estimate the availability of minority- and woman-owned businesses would lead to estimates that were biased in favor of businesses that could be easily contacted by telephone. However, work specialization as a potential source of non-response bias in the BBC availability analysis is minimized, because the availability analysis examines businesses within particular work fields before calculating overall availability estimates. Thus, the potential for businesses in highly mobile fields to be less likely to complete a survey is less important, because the study team calculated availability estimates within those fields before combining them in a dollar-weighted fashion with availability estimates from other fields. Work specialization would be a greater source of non-response bias if particular subsets of businesses within a particular field were less likely than other subsets to be easily contacted by telephone.

Language barriers. INDOT contracting documents are in English and are not in other languages. For that reason, the study team made the decision to only include businesses able to complete surveys in English in the availability analysis. Businesses unable to complete the survey due to language barriers represented less than one percent of contacted businesses.

Response reliability. Business owners and managers were asked questions that may be difficult to answer including questions about their revenues. For that reason, the study team collected corresponding D&B information for their establishments and asked respondents to confirm that information or provide more accurate estimates. Further, respondents were not typically asked to give absolute figures for difficult questions such as revenue and capacity. Rather, they were given ranges of dollar figures. BBC explored the reliability of survey responses in a number of ways. For example:

- BBC reviewed data from the availability surveys in light of information from other sources such as vendor information that the study team collected from INDOT and other participating entities. For example, certification databases include data on the race/ethnicity and gender of the owners of MBE/WBE- and DBE-certified businesses. The study team compared survey responses concerning business ownership with that information.
- BBC examined INDOT contract data to further explore the largest contracts and subcontracts awarded to businesses that participated in the availability surveys. BBC compared survey responses about the largest contracts that businesses won during the past five years with actual INDOT contract data.
- INDOT reviewed vendor data that the study team collected and compiled as part of the availability analysis and provided feedback regarding its accuracy.

State of Indiana Disparity Study —
Availability Survey Instrument [Construction]

Hello. My name is [interviewer name] from Engaging Solutions. We are calling on behalf of the State of Indiana, including the Indiana Department of Administration; the Indiana Department of Transportation; the Indianapolis Airport Authority; the State Lottery Commission of Indiana; and public universities and colleges across the state.

This is not a sales call. We are developing a list of companies interested in providing construction-related services for state or local government agencies or for public colleges in Indiana. Who can I speak with to get the information that we need from your firm?

[AFTER REACHING AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE SURVEY AND BEGIN WITH QUESTIONS]

[IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO EXISTING DATA ON COMPANIES INTERESTED IN WORKING WITH THE ENTITIES]

X1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [*firm name*]?

1=RIGHT COMPANY – SKIP TO A1

2=NOT RIGHT COMPANY

99=REFUSE TO GIVE INFORMATION – TERMINATE

Y1. What is the name of this firm?

1=VERBATIM

Y2. Can you give me any information about [*new firm name*]?

1=Yes, same owner doing business under a different name – SKIP TO Y4

2=Yes, can give information about named company

3=Company bought/sold/changed ownership – SKIP TO Y4

98=No, does not have information – TERMINATE

99=Refused to give information – TERMINATE

Y3. Can you give me the complete address or city for [*new firm name*]?

(NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT:

. STREET ADDRESS

. CITY

. STATE

. ZIP)

1=VERBATIM

Y4. Can you give me the name of the owner or manager of the new business?

(ENTER UPDATED NAME)

1=VERBATIM

Y5. Can I have a telephone number for him/her?

(ENTER UPDATED PHONE)

1=VERBATIM

Y6. Do you work for this new company?

1=YES

2=NO – TERMINATE

A1. First, I want to confirm that your firm does work or provides materials related to construction, maintenance, or design. Is that correct?

(NOTE TO INTERVIEWER – INCLUDES ANY WORK RELATED TO CONSTRUCTION, MAINTENANCE, OR DESIGN SUCH AS BUILDING AND PARKING FACILITIES, PAVING AND CONCRETE, TUNNELS, BRIDGES AND ROADS, AND OTHER TRANSPORTATION-RELATED PROJECTS. IT ALSO INCLUDES TRUCKING AND HAULING)

(NOTE TO INTERVIEWER - INCLUDES HAVING DONE WORK, TRYING TO SELL THIS WORK, OR PROVIDING MATERIALS)

1=Yes

2=No - TERMINATE

A2. Let me confirm that [*firm name/new firm name*] is a business, as opposed to a nonprofit organization, a foundation, or a government office. Is that correct?

1=Yes, a business

2=No, other - TERMINATE

A4a. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates that your main line of business is [*SIC Code description*]. Is that correct?

(NOTE TO INTERVIEWER - IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES INFORMATION ON BUSINESSES THROUGHOUT THE COUNTRY)

1=Yes – SKIP TO A4c

2=No

98=(DON'T KNOW)

99=(REFUSED)

A4b. What would you say is the main line of business at [*firm name / new firm name*]?

(NOTE TO INTERVIEWER: IF RESPONDENT INDICATES THAT FIRM'S MAIN LINE OF BUSINESS IS "GENERAL CONSTRUCTION" OR "GENERAL CONTRACTOR," PROBE TO FIND OUT IF MAIN LINE OF BUSINESS IS CLOSER TO BUILDING CONSTRUCTION OR HIGHWAY AND ROAD CONSTRUCTION.)

1=VERBATIM

A4c. What other types of work, if any, does your business perform?

(ENTER VERBATIM RESPONSE)

1=VERBATIM

A5. Is this the sole location for your business, or do you have offices in other locations?

1=Sole location

2=Have other locations

98=(DON'T KNOW)

99=(REFUSED)

A6. Is your company a subsidiary or affiliate of another firm?

1=Independent – SKIP TO B1

2=Subsidiary or affiliate of another firm

98=(DON'T KNOW) – SKIP TO B1

99=(REFUSED) – SKIP TO B1

A7. What is the name of your parent company?

1=VERBATIM

98=(DON'T KNOW)

99=(REFUSED)

B1. Next, I have a few questions about your company's role in doing work or providing materials related to construction, maintenance, or design. During the past five years, has your company submitted a bid or a price quote for any part of a contract for a state or local government agency or public college in Indiana?

1=Yes

2=No – SKIP TO B3

98=(DON'T KNOW) – SKIP TO B3

99=(REFUSED) – SKIP TO B3

B2. Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?

[MULTIPUNCH]

1=Prime contractor

2=Subcontractor

3=Trucker/hauler

4=Supplier (or manufacturer)

98=(DON'T KNOW)

99=(REFUSED)

B3. During the past five years, has your company received an award for work on any part of a contract for a state or local government agency or for a public college in Indiana?

1=Yes

2=No – SKIP TO B5

98=(DON'T KNOW) – SKIP TO B5

99=(REFUSED) – SKIP TO B5

B4. Were those awards to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?

[MULTIPUNCH]

1=Prime contractor

2=Subcontractor

3=Trucker/hauler

4=Supplier (or manufacturer)

98=(DON'T KNOW)

99=(REFUSED)

B5. During the past five years, has your company submitted a bid or a price quote for any part of a contract for a private sector organization in Indiana?

1=Yes

2=No – SKIP TO B7

98=(DON'T KNOW) – SKIP TO B7

99=(REFUSED) – SKIP TO B7

B6. Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?

[MULTIPUNCH]

1=Prime contractor

2=Subcontractor

3=Trucker/hauler

4=Supplier (or manufacturer)

98=(DON'T KNOW)

99=(REFUSED)

B7. During the past five years, has your company received an award for work on any part of a contract for a private sector organization in Indiana?

1=Yes

2=No – SKIP TO B9

98=(DON'T KNOW) – SKIP TO B9

99=(REFUSED) – SKIP TO B9

B8. Were those awards to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?

[MULTIPUNCH]

1=Prime contractor

2=Subcontractor

3=Trucker/hauler

4=Supplier (or manufacturer)

98=(DON'T KNOW)

99=(REFUSED)

B9. Please think about future construction, maintenance, or design-related work as you answer the following few questions. Is your company qualified and interested in working with state or local government agencies in Indiana as a prime contractor?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B10. Is your company qualified and interested in working with state or local government agencies in Indiana as a subcontractor, trucker/hauler, or supplier?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B11. Is your company qualified and interested in working with public colleges in Indiana as a prime contractor?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B12. Is your company qualified and interested in working with public colleges in Indiana as a subcontractor?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B13. Is your company willing to meet security and badging requirements to work onsite or post-security at an airport?

[IF ASKED, FIRMS WOULD BE REQUIRED TO EITHER: 1) HAVE ONE EMPLOYEE GO THROUGH THE BADGING PROCESS FOR EVERY 6 EMPLOYEES THAT WOULD BE WORKING ONSITE AT THE AIRPORT; OR 2) HIRE ONE THIRD PARTY SECURITY BADGED "ESCORT" FOR EVERY 6 EMPLOYEES THAT WOULD BE WORKING ON SITE AT THE AIRPORT ($25-$40 PER HOUR FOR THE ESCORT)]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B14. To work onsite at the Indianapolis International Airport, a construction firm must carry the following insurance policies:

- **Professional liability insurance of $2 million per occurrence;**
- **Umbrella liability insurance of $3 million for work in unsecure areas of the airport, or umbrella liability insurance of $10 million for work in secure areas of the airport.**

Does your firm currently maintain those levels of insurance or would it be willing to do so to work onsite at the Indianapolis International Airport?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1a. Now I want to ask you about the geographic areas your company serves within Indiana. As you answer, think about whether your company could be involved in potential work in that region. Is your company able to do work or serve customers in any part of Northern Indiana?

[NORTHERN INDIANA INCLUDES THE GARY, MICHIGAN CITY-LA PORTE, SOUTH BEND, ELKHART, AND FORT WAYNE AREAS.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1b. Is your company able to do work or serve customers in any part of Central Indiana?

[CENTRAL INDIANA INCLUDES THE INDIANAPOLIS, LAFAYETTE, KOKOMO, ANDERSON, MUNCIE, AND TERRE HAUTE AREAS.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1c. Is your company able to do work or serve customers in any part of Southern Indiana?

[SOUTHERN INDIANA INCLUDES THE BLOOMINGTON, COLUMBUS, VINCENNES, AND EVANSVILLE AREAS.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C2. [IF "YES" TO C1a] You said that your firm is able to do work or serve customers in Northern Indiana. Is your company able to serve all of Northern Indiana or only certain parts of the region?

[NOTE TO INTERVIEWER – REPEAT AREAS THAT MAKE UP NORTHERN INDIANA.]

1=All of the region – SKIP TO C3

2=Only parts of the region

98=(DON'T KNOW)

99=(REFUSED) – SKIP TO C3

C2a. Is your company able to serve the greater Gary area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C2b. Is your company able to serve the Michigan City-La Porte area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C2c. Is your company able to serve the South Bend area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C2d. Is your company able to serve the Elkhart area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C2e. Is your company able to serve the Fort Wayne area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C3. [IF "YES" TO C1b] You said that your firm is able to do work or serve customers in Central Indiana. Is your company able to serve all of Central Indiana or only certain parts of the region?

[NOTE TO INTERVIEWER – REPEAT AREAS THAT MAKE UP CENTRAL INDIANA.]

1=All of the region – SKIP TO C4

2=Only parts of the region

98=(DON'T KNOW)

99=(REFUSED) – SKIP TO C4

C3a. Is your company able to serve the Indianapolis area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C3b. Is your company able to serve the Lafayette area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C3c. Is your company able to serve the Kokomo area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C3d. Is your company able to serve the Anderson area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C3e. Is your company able to serve the Muncie area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C3f. Is your company able to serve the Terre Haute area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C4. [IF "YES" TO C1c] You said that your firm is able to do work or serve customers in Southern Indiana. Is your company able to serve all of Southern Indiana or only certain parts of the region?

[NOTE TO INTERVIEWER –REPEAT THE AREAS THAT MAKE UP SOUTHERN INDIANA.]

1=All of the region – SKIP TO D1

2=Only parts of the region

98=(DON'T KNOW)

99=(REFUSED) – SKIP TO D1

C4a. Is your company able to serve the Bloomington area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C4b. Is your company able to serve the Columbus area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C4c. Is your company able to serve the Vincennes area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C4d. Is your company able to serve the Evansville area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

D1. About what year was your firm established?

1=NUMERIC (1600-2008)

9998 = (DON'T KNOW)

9999 = (REFUSED)

D2. In rough dollar terms, what was the largest contract or subcontract that your company was awarded in during the past five years?

[NOTE TO INTERVIEWER – IF ASKED, INCLUDES EITHER PRIVATE SECTOR OR PUBLIC SECTOR]

[NOTE TO INTERVIEWER - INCLUDES CONTRACTS NOT YET COMPLETE]

[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]

1=$100,000 or less

2=More than $100,000 to $500,000

3=More than $500,000 to $1 million

4=More than $1 million to $2 million

5=More than $2 million to $5 million

6=More than $5 million to $10 million

7=More than $10 million to $20 million

8=More than $20 million to $50 million

9=More than $50 million to $100 million

10= More than $100 million to $200 million

11=$200 million or greater

97=(NONE)

98=(DON'T KNOW)

99=(REFUSED

D3. Was that the largest contract or subcontract that your company bid on or submitted quotes for during the past five years?

1=Yes – SKIP TO D5

2=No

98=(DON'T KNOW) – SKIP TO D5

99=(REFUSED) – SKIP TO D5

D4. What was the largest contract or subcontract that your company bid on or submitted quotes for during the past five years?

[NOTE TO INTERVIEWER – IF ASKED, INCLUDES EITHER PRIVATE SECTOR OR PUBLIC SECTOR]

[NOTE TO INTERVIEWER – READ CATEGORIES IF NECESSARY]

1=$100,000 or less

2=More than $100,000 to $500,000

3=More than $500,000 to $1 million

4=More than $1 million to $2 million

5=More than $2 million to $5 million

6=More than $5 million to $10 million

7=More than $10 million to $20 million

8=More than $20 million to $50 million

9=More than $50 million to $100 million

10= More than $100 million to $200 million

11=$200 million or greater

97=(NONE)

98=(DON'T KNOW)

99=(REFUSED)

D5. Does your firm participate in, or is it willing to participate in, a Joint Apprenticeship Training program that has been registered and certified with the U.S. Department of Labor's Bureau of Apprenticeship and Training?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

D6. Does your firm participate in, or is it willing to participate in, a Joint Apprenticeship Training program operated by the Associated Builders and Contractors of Indiana, or a comparable program through another state, that has been registered and certified with the U.S. Department of Labor's Bureau of Apprenticeship and Training?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

D7. Does your firm <u>operate its own</u>, or is it willing to operate its own, apprenticeship training program that has been registered and certified with the U.S. Department of Labor's Bureau of Apprenticeship and Training?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

E1. My next questions are about the ownership of the business. A business is defined as woman-owned if more than half—that is, 51 percent or more—of the ownership and control is by women. By this definition, is [*firm name / new firm name*] a woman-owned business?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

E2. A business is defined as minority-owned if more than half—that is, 51 percent or more—of the ownership and control is Black American, Asian, Hispanic, Native American or another minority group. By this definition, is [*firm name* || *new firm name*] a minority-owned business?

1=Yes

2=No – SKIP TO F1

98=(DON'T KNOW) – SKIP TO F1

99=(REFUSED) – SKIP TO F1

E3. Would you say that the minority group ownership of your company is mostly Black American, Asian Pacific American, Subcontinent Asian American, Hispanic American, Native American, or another minority group?

1=Black American

2=Asian Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia(Kampuchea),Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Common-wealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong)

3=Hispanic American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)

4=Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians)

5=Subcontinent Asian American (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)

6=(OTHER - SPECIFY) _____

98=(DON'T KNOW)

99=(REFUSED)

F1. Dun & Bradstreet lists the average annual gross revenue of your company, just considering your location, to be [*dollar amount*]. Is that an accurate estimate for your company's average annual gross revenue over the last three years?

1=Yes – SKIP TO F3

2=No

98=(DON'T KNOW) – SKIP TO F3

99=(REFUSED) – SKIP TO F3

F2. Roughly, what was the average annual gross revenue of your company, just considering your location, over the last three years? Would you say . . .

[READ LIST]

1=Less than $1 Million	6=$16.6 Million - $18.5 Million
2=$1 Million - $4.5 Million	7=$18.6 Million - $24 Million
3=$4.6 Million - $7 Million	8=$24.1 Million or more
4=$7.1 Million - $12 Million	98= (DON'T KNOW)
5=$12.1 Million - $16.5 Million	99= (REFUSED)

F3. [ONLY IF A5 = 2] Roughly, what was the average annual gross revenue of your company, for all of your locations over the last three years? Would you say . . .

[READ LIST]

1=Less than $1 Million	6=$16.6 Million - $18.5 Million
2=$1 Million - $4.5 Million	7=$18.6 Million - $24 Million
3=$4.6 Million - $7 Million	8=$24.1 Million or more
4=$7.1 Million - $12 Million	98= (DON'T KNOW)
5=$12.1 Million - $16.5 Million	99= (REFUSED)

G1. We're interested in whether your company has experienced barriers or difficulties in Indiana associated with starting or expanding a business in your industry or with obtaining work. Do you have any thoughts to share on these topics?

1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)

97=(NOTHING/NONE/NO COMMENTS)

98=(DON'T KNOW)

99=(REFUSED)

G2. Would you be willing to participate in a follow-up interview about any of those issues?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

H1. Just a few last questions. What is your name?

1=VERBATIM

H2. What is your position at [*firm name / new firm name*]?

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

10=(OTHER - SPECIFY) _____

99=(REFUSED)

Thank you very much for your participation. If you have any questions or concerns, please contact the Indiana Department of Administration Division of Supplier Diversity at Telephone: (317) 232-3061, **Fax:** (317) 233-6921, **or E-mail:** mwbe@idoa.in.gov.

APPENDIX D.
Marketplace Analyses

Appendix D presents quantitative analyses related to barriers that minorities, women, and minority- and woman-owned businesses face in Indiana and nationwide in the areas of human capital, financial capital, business ownership, and business success. The analyses presented in Appendix D are summarized in Chapter 3.

Figure D-1.
Percentage of all workers 25 and older with at least a four-year degree, Indiana and the United States, 2008-2012

Indiana	2008-2012	
Race/ethnicity		
Black American	19.5 %	**
Asian Pacific American	53.2	**
Subcontinent Asian American	76.2	**
Hispanic American	13.9	**
Native American	19.3	**
Other race minority	46.1	**
Non-Hispanic white	28.3	
Gender		
Women	28.3 %	**
Men	26.6	
United States	**2008-2012**	
Race/ethnicity		
Black American	23.2 %	**
Asian Pacific American	49.5	**
Subcontinent Asian American	74.5	**
Hispanic American	15.5	**
Native American	21.2	**
Other race minority	36.1	
Non-Hispanic white	37.0	
Gender		
Women	34.4 %	**
Men	32.1	

Note:

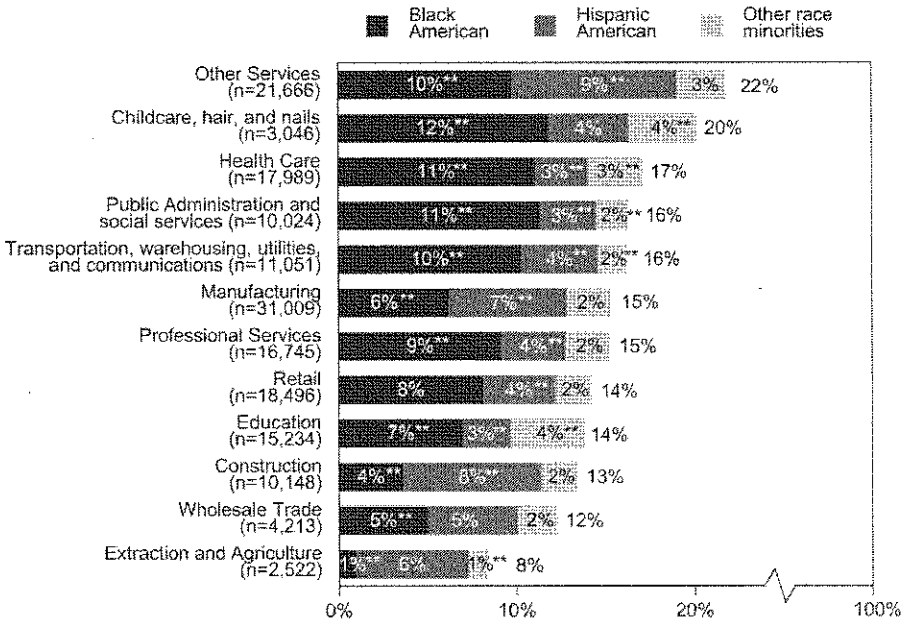
** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 95% confidence level.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-1 indicates that, compared to Non-Hispanic white Americans working in Indiana, smaller percentages of Black Americans, Hispanic Americans, and Native Americans have four-year college degrees. In contrast, larger percentages Asian Pacific Americans, Subcontinent Asian Americans, and other race minorities have four-year college degrees. In addition, a larger percentage of women than men working in Indiana have four-year college degrees.

Figure D-2.
Percent representation of minorities in various industries in Indiana, 2008-2012



Note: ** Denotes that the difference in proportions between minority workers in the specified industry and all industries is statistically significant at the 95% confidence level.

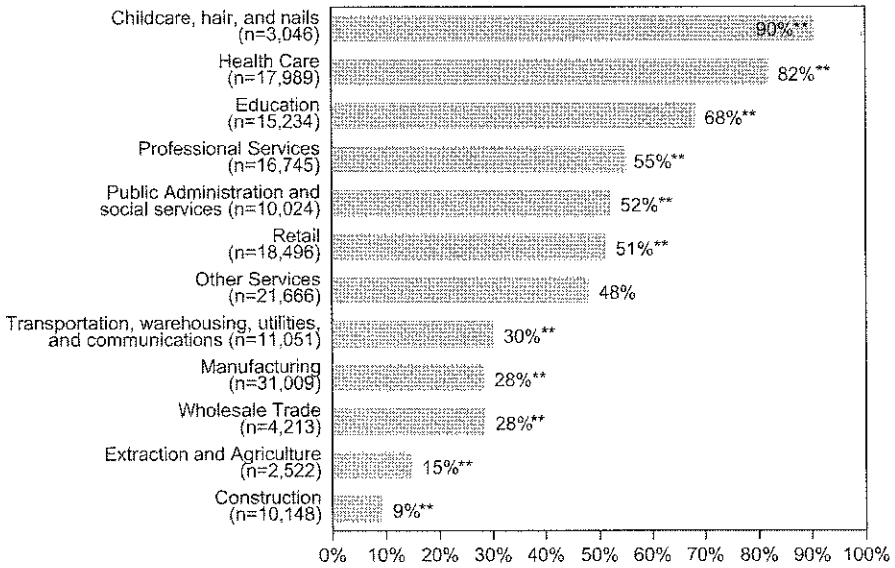
The representation of minorities among all Indiana workers is 8% for Black Americans, 5% for Hispanic Americans, 3% for other race minorities, and 16% for all minorities considered together.

Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services. Workers in the rental and leasing; travel; investigation; waste remediation; arts; entertainment; recreation; accommodations; food services; and select other services were combined into one category of other services/ Workers in child day care services, barber shops, beauty salons, nail salons, and other personal services were combined into one category of childcare, hair, and nails.

Source: BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-2 indicates that the Indiana industries with the highest representations of minority workers are other services; childcare, hair, and nails; and healthcare. The Indiana industries with the lowest representations of minority workers are construction; wholesale trade; and extraction and agriculture.

Figure D-3.
Percent representation of women in various industries in Indiana, 2008-2012



Note: ** Denotes that the difference in proportions between women workers in the specified industry and all industries is statistically significant at the 95% confidence level.

The representation of women among all Indiana workers is 47%.

Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services. Workers in the rental and leasing; travel; investigation; waste remediation; arts; entertainment; recreation; accommodations; food services; and select other services were combined into one category of other services/ Workers in child day care services, barber shops, beauty salons, nail salons, and other personal services were combined into one category of childcare, hair, and nails.

Source: BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-3 indicates that the Indiana industries with the highest representations of women workers are childcare, hair, and nails; healthcare; and education. The Indiana industries with the lowest representations of women workers are wholesale trade; extraction and agriculture; and construction.

Figure D-4.
Demographic characteristics of workers in study-related industries and all industries, Indiana and the United States, 2000

Indiana	All industries (n= 153,716)	Construction (n=10,455)	Professional Services (n=5,007)	Goods (n=7,378)	Support Services (n=12,334)
Race/ethnicity					
Black American	7.4 %	3.6 % **	8.1 %	4.6 % **	10.3 % **
Asian Pacific American	0.8	0.2 **	1.3	0.6	1.2 **
Subcontinent Asian American	0.3	0.0	0.9	0.1	0.2 **
Hispanic American	3.2	3.6	2.3 **	2.4 **	4.7 **
Native American	0.7	0.7	0.7	0.6	0.9
Other race minority	0.1	0.1	0.2	0.1	0.3
Total minority	**12.4 %**	**8.2 %**	**13.5 %**	**8.4 %**	**17.7 %**
Non-Hispanic white	87.6	91.8 **	86.5	91.6 **	82.3 **
Total	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**
Gender					
Women	46.5 %	10.5 % **	48.9 % **	27.7 % **	53.0 % **
Men	53.5	89.5 **	51.1	72.3 **	47.0 **
Total	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**
United States	**All industries (n= 6,832,970)**	**Construction (n=480,280)**	**Professional Services (n=348,676)**	**Goods (n=342,027)**	**Support Services (n=563,520)**
Race/ethnicity					
Black American	10.9 %	6.2 % **	8.9 % **	7.0 % **	13.0 % **
Asian Pacific American	3.4	1.2 **	4.6 **	3.1 **	4.4 **
Subcontinent Asian American	0.7	0.2 **	2.0 **	0.6 **	0.6
Hispanic American	10.7	15.0 **	6.6 **	11.0 **	15.1 **
Native American	1.2	1.6 **	0.9 **	0.9 **	1.5
Other race minority	0.4	0.4	0.4	0.4	0.6
Total minority	**27.3 %**	**24.5 %**	**23.5 %**	**23.1 %**	**35.2 %**
Non-Hispanic white	72.7	75.5 **	76.5 **	76.9 **	64.8 **
Total	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**
Gender					
Women	46.5 %	9.9 % **	46.5 %	28.7 % **	47.6 % **
Men	53.5	90.1 **	53.5	71.3 **	52.4 **
Total	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**

Note: ** Denotes that the difference in proportions between workers in each study-related industry and workers in all industries is statistically significant at the 95% confidence level.

Source: BBC Research & Consulting from 2000 U.S. Census 5% sample Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-4 indicates that in 2000 there were smaller percentages of Black Americans, Asian Pacific Americans, and women working in the Indiana construction industry than in all industries considered together. There was a smaller percentage of Hispanic Americans working in the Indiana professional services industry than in all industries considered together. There were smaller percentages of Black Americans, Hispanic Americans, and women working in the Indiana goods industry than in all industries considered together. Finally, there was a smaller percentage of Subcontinent Asian Americans working in the Indiana support services industries than in all industries considered together.

Figure D-5.
Demographic characteristics of workers in study-related industries and all industries, Indiana and the United States, 2008-2012

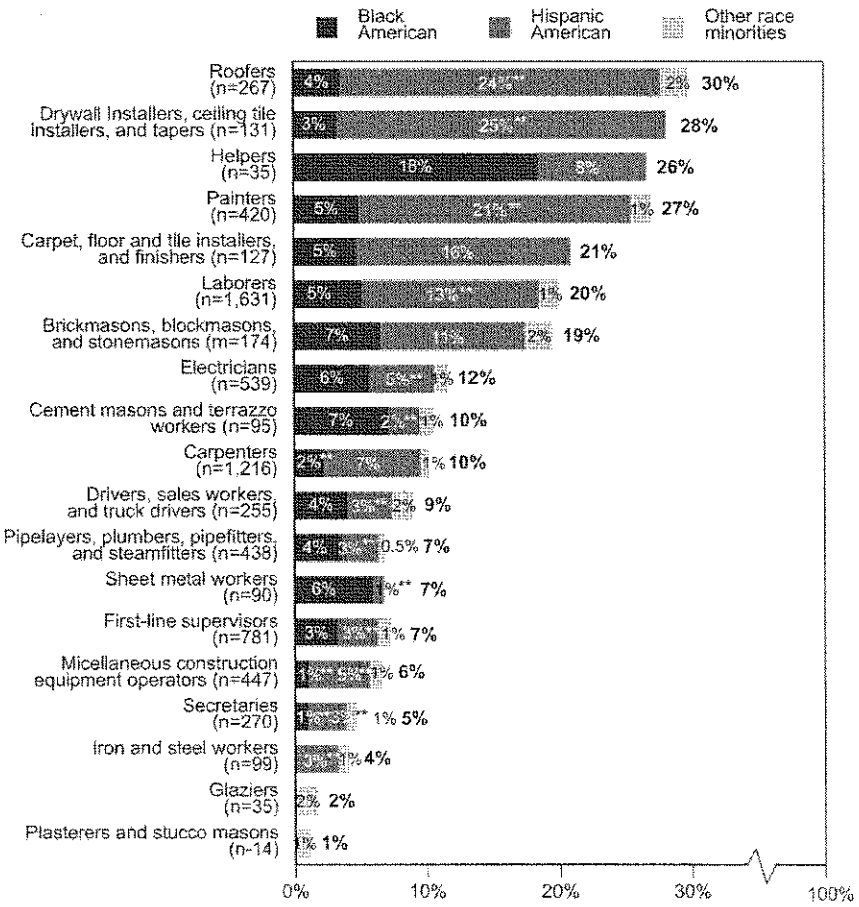
Indiana	All industries (n= 164,218)	Construction (n=10,148)	Professional Services (n=8,144)	Goods (n=6,450)	Support Services (n=14,636)
Race/ethnicity					
Black American	8.4 %	3.6 % **	10.3 % **	5.1 % **	10.7 % **
Asian Pacific American	1.2	0.2 **	1.4	0.9 **	1.7 **
Subcontinent Asian American	0.5	0.1 **	1.7 **	0.3	0.3 **
Hispanic American	5.3	7.7 **	4.0 **	5.1	9.7 **
Native American	0.6	0.6	0.4 **	0.6	0.7
Other race minority	0.2	0.1 **	0.2	0.1	0.2
Total minority	**16.3 %**	**12.4 %**	**18.0 %**	**12.2 %**	**23.4 %**
Non-Hispanic white	83.7	87.6 **	82.0 **	87.8 **	76.6 **
Total	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**
Gender					
Women	47.3 %	9.2 % **	50.5 % **	26.5 % **	53.2 % **
Men	52.7	90.8 **	49.5 **	73.5 **	46.8 **
Total	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**
United States	**All industries (n=7,600,739)**	**Construction (n=496,841)**	**Professional Services (n=514,952)**	**Goods (n=312,307)**	**Support Services (n=658,996)**
Race/ethnicity					
Black American	11.9 %	6.0 % **	10.5 % **	7.9 % **	13.7 % **
Asian Pacific American	4.3	1.6 **	5.9 **	4.0 **	5.2 **
Subcontinent Asian American	1.2	0.2 **	3.5 **	0.9 **	0.8 **
Hispanic American	15.2	23.7 **	9.2 **	15.9 **	21.7 **
Native American	1.1	1.4 **	0.8 **	0.8 **	1.3 **
Other race minority	0.2	0.2	0.3 **	0.2 **	0.3 **
Total minority	**34.0 %**	**33.1 %**	**30.3 %**	**29.7 %**	**43.0 %**
Non-Hispanic white	66.0	66.9 **	69.7 **	70.3 **	57.0 **
Total	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**
Gender					
Women	47.2 %	9.0 % **	47.3 %	28.1 % **	48.3 % **
Men	52.8	91.0 **	52.7	71.9 **	51.7 **
Total	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**

Note: ** Denotes that the difference in proportions between workers in each study-related industry and workers in all industries is statistically significant at the 95% confidence level.

Source: BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-5 indicates that there are smaller percentages of Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, other race minorities, and women working in the Indiana construction industry than in all industries considered together. There are smaller percentages of Hispanic Americans and Native Americans working in the Indiana professional services industry than in all industries considered together. There are smaller percentages of Black Americans, Asian Pacific Americans, and women working in the Indiana goods industry than in all industries considered together. Finally, there is a smaller percentage of Subcontinent Asian Americans working in the Indiana support services industries than in all industries considered together.

Figure D-6.
Percent representation of minorities in selected construction occupations in Indiana, 2008-2012



Note:

** Denotes that the difference in proportions between minority workers in the specified occupation and all construction occupations considered together is statistically significant at the 95% confidence level.

The representation of minorities among all Indiana construction workers is 4% for Black Americans, 8% for Hispanic Americans, 1% for other race minorities, and 12% for all minorities considered together.

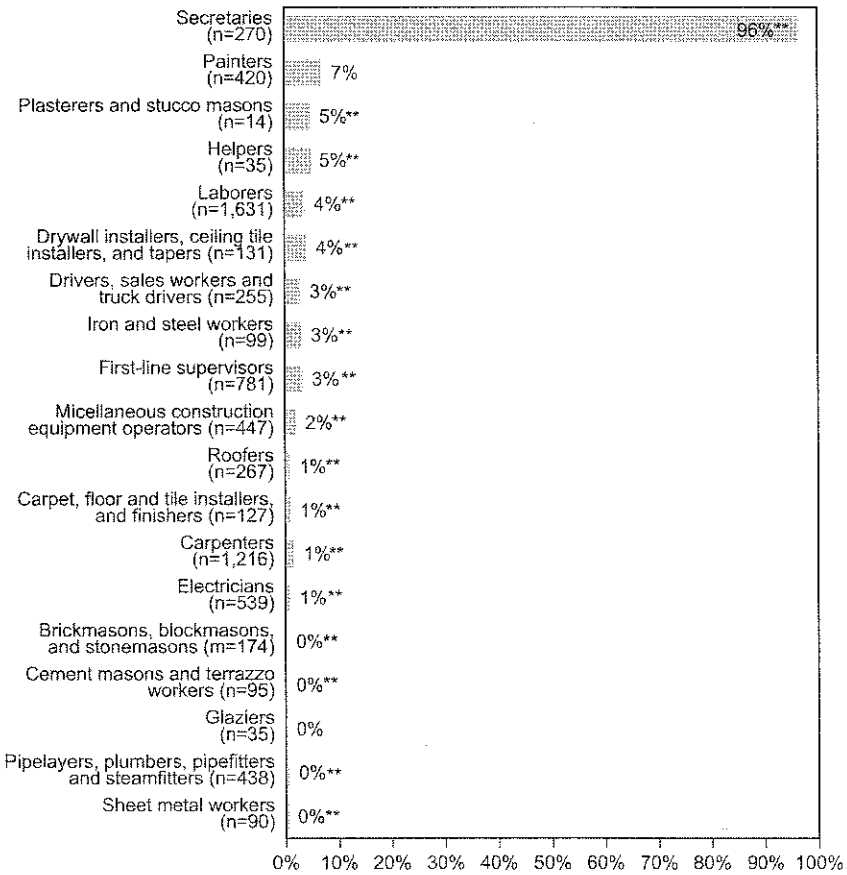
Crane and tower operators; dredge, excavating and loading machine and dragline operators; paving, surfacing, and tamping equipment operators; and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-6 indicates that the Indiana construction occupations with the highest representations of minority workers are roofers; drywall installers, ceiling tile installers, and tapers; and helpers. The Indiana construction occupations with the lowest representations of minority workers are iron and steel workers; glaziers; and plasterers and stucco masons.

Figure D-7.
Percent representation of women in selected construction occupations in Indiana, 2008-2012



Note:

** Denotes that the difference in proportions between women workers in the specified occupation and all construction occupations considered together is statistically significant at the 95% confidence level.

The representation of women among all Indiana construction workers is 9%.

Crane and tower operators; dredge, excavating and loading machine and dragline operators; paving, surfacing, and tamping equipment operators; and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-7 indicates that the Indiana construction occupations with the highest representations of women workers are secretaries; painters; and plasterers and stucco masons. The Indiana construction occupations with the lowest representations of women workers are glaziers; pipelayers, plumbers, pipefitters, and steamfitters; and sheet metal workers.

Figure D-8.
Percentage of workers who worked as a manager in each study-related industry, Indiana and the United States, 2008-2012

Indiana	Construction	Professional Services	Goods	Support Services
Race/ethnicity				
Black American	5.8 %	4.9 %	0.5 % **	6.3 % **
Asian Pacific American	9.4	13.0	9.0	13.3 **
Subcontinent Asian American	37.9	7.5	10.8	21.1
Hispanic American	2.4 **	2.1 **	2.6	4.8 **
Native American	6.4	2.0 **	1.7	6.7
Other race minority	10.4	3.3	0.0	11.9
Non-Hispanic white	7.9	6.5	4.0	8.4
Gender				
Women	4.8 % **	4.6 % **	3.2 %	7.1 % **
Men	7.7	7.9	4.0	8.9
All individuals	**7.4**	**6.2**	**3.8**	**8.0**

United States	Construction	Professional Services	Goods	Support Services
Race/ethnicity				
Black American	4.7 % **	4.6 % **	1.8 % **	4.6 % **
Asian Pacific American	9.4 **	6.3 **	5.1	11.1 **
Subcontinent Asian American	14.7 **	9.1	6.9 **	12.5 **
Hispanic American	3.1 **	5.1 **	2.2 **	5.0 **
Native American	5.8 **	6.0 **	2.8 **	5.6 **
Other race minority	6.5 **	5.5 **	2.5 **	6.0 **
Non-Hispanic white	10.4	8.7	5.1	8.6
Gender				
Women	6.8 % **	6.6 % **	3.3 **	6.6 % **
Men	8.4	8.9	4.8	8.1
All individuals	**8.2**	**7.8**	**4.4**	**7.4**

Note: ** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 95% confidence level.

Source: BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-8 indicates that there is a smaller percentage of Hispanic Americans than non-Hispanic white Americans working as managers in the Indiana construction industry. In addition, a smaller percentage of women than men work as managers in the Indiana construction industry. Compared to non-Hispanic white Americans, smaller percentages of Hispanic Americans and Native Americans work as managers in the Indiana professional services industry. In addition, a smaller percentage of women than men work as managers in the Indiana professional services industry. There is a smaller percentage of Black Americans than non-Hispanic white Americans working as managers in the Indiana goods industry. Finally, compared to non-Hispanic white Americans, there are smaller percentages of Black Americans and Hispanic Americans working as managers in the Indiana support services industry. In addition, a smaller percentage of women than men work as managers in the Indiana support services industry.

Figure D-9.
Mean annual wages, Indiana and the United States, 2008-2012

Note:

The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.

**, ++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level for the United States as a whole and Indiana, respectively.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

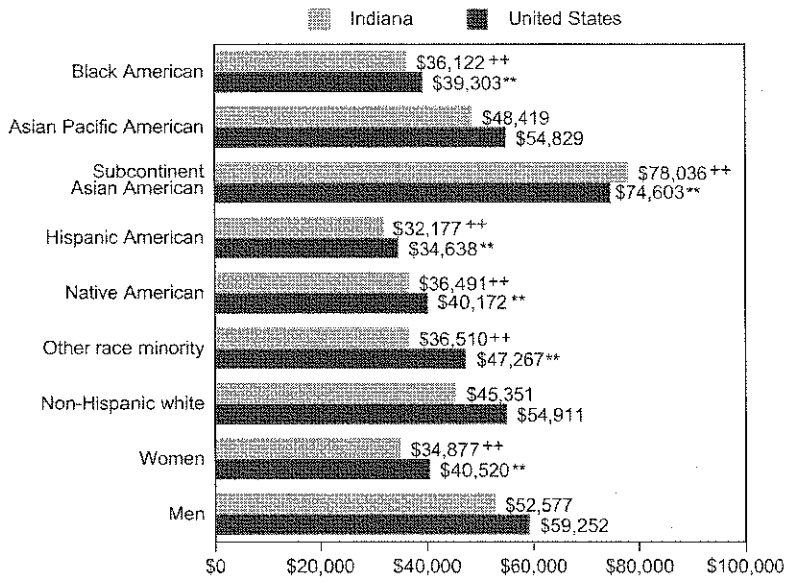


Figure D-9 indicates that, compared to non-Hispanic white Americans, Black Americans, Hispanic Americans, Native Americans, and other race minorities in Indiana exhibit lower mean annual wages. In addition, women in Indiana exhibit lower mean annual wages than men.

Figure D-10.
Predictors of annual wages (regression), Indiana, 2008-2012

Note:

The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

*, ** Denotes statistical significance at the 90% and 95% confidence levels, respectively.

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, high school diploma for the education variables, and manufacturing for industry variables.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable	Exponentiated Coefficient
Constant	8769.987 **
Black American	0.901 **
Asian Pacific American	0.946
Subcontinent Asian American	1.013
Hispanic American	0.936 **
Native American	0.871 **
Other minority group	0.706 **
Women	0.759 **
Less than high school education	0.825 **
Some college	1.184 **
Four-year degree	1.591 **
Advanced degree	2.198 **
Disabled	0.790 **
Military experience	0.968 **
Speaks English well	1.290 **
Age	1.048 **
Age-squared	1.000 **
Married	1.115 **
Children	1.019 **
Number of people over 65 in household	0.898 **
Public sector worker	1.111 **
Manager	1.311 **
Part time worker	0.379 **
Extraction and agriculture	0.852 **
Construction	0.935 **
Wholesale trade	0.963 **
Retail trade	0.727 **
Transportation, warehouse, & information	0.982 *
Professional services	0.957 **
Education	0.642 **
Health care	1.019 *
Other services	0.669 **
Public administration and social services	0.760 **

Figure D-10 indicates that, compared to being a non-Hispanic white American in Indiana, being Black American, Hispanic American, Native American, or other race minority is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that, all else equal, being Black American is associated with making approximately $0.90 for every dollar compared to being non-Hispanic white American.) In addition, being a woman is related to lower annual wages compared to being a man in Indiana, even after accounting for various other personal characteristics.

Figure D-11.
Predictors of annual wages (regression), United States, 2008-2012

Note:

The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, high school diploma for the education variables, and manufacturing for industry variables.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable	Exponentiated Coefficient
Constant	8012.290 **
Black American	0.875 **
Asian Pacific American	0.957 **
Subcontinent Asian American	0.940 **
Hispanic American	0.913 **
Native American	0.865 **
Other minority group	0.921 **
Women	0.778 **
Less than high school education	0.851 **
Some college	1.204 **
Four-year degree	1.665 **
Advanced degree	2.298 **
Disabled	0.793 **
Military experience	0.998
Speaks English well	1.330 **
Age	1.057 **
Age-squared	0.999 **
Married	1.104 **
Children	1.012 **
Number of people over 65 in household	0.913 **
Midwest	0.876 **
South	0.891 **
West	0.987 **
Public sector worker	1.120 **
Manager	1.315 **
Part time worker	0.373 **
Extraction and agriculture	0.899 **
Construction	0.927 **
Wholesale trade	0.965 **
Retail trade	0.754 **
Transportation, warehouse, & information	1.026 **
Professional services	1.053 **
Education	0.664 **
Health care	1.004 **
Other services	0.701 **
Public administration and social services	0.830 **

Figure D-11 indicates that, compared to being a non-Hispanic white American in the United States, being Black American, Asian Pacific American, Subcontinent Asian American, Native American, or other minority is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately $0.88 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, being a woman is related to lower annual wages compared to being a man, even after accounting for various other personal characteristics.

Figure D-12.
Home Ownership Rates, Indiana and the United States, 2008-2012

Note:

The sample universe is all households.

**, ++ Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level for the United States as a whole and Indiana, respectively.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

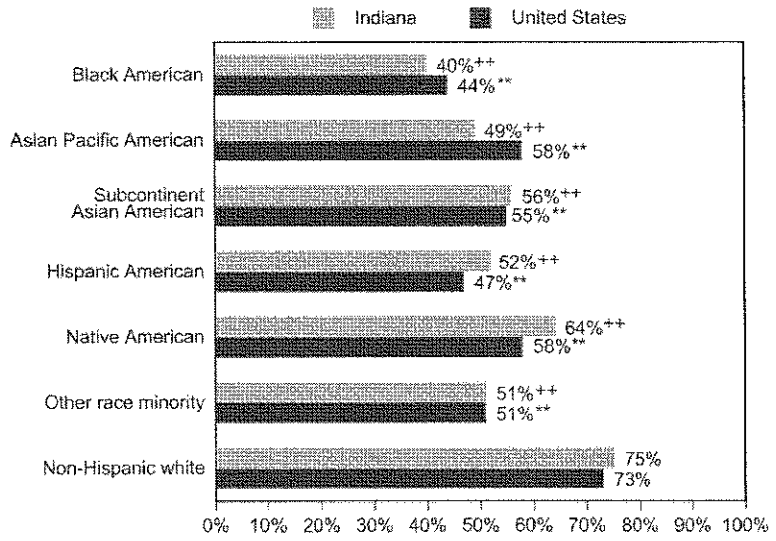


Figure D-12 indicates that, compared to non-Hispanic white Americans, smaller percentages of Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans, and other race minorities in Indiana own homes.

Figure D-13.
Median home values, Indiana and the United States, 2008-2012

Note:

The sample universe is all owner-occupied housing units.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

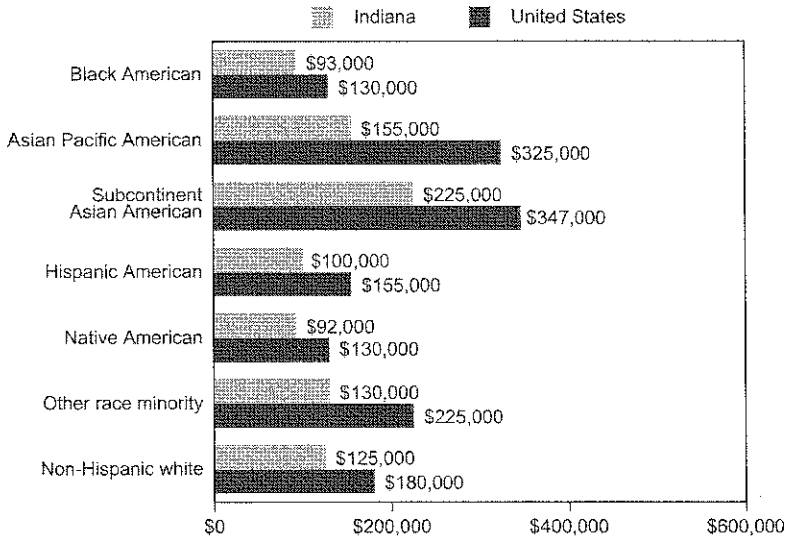


Figure D-13 indicates that Black American, Hispanic American, and Native American homeowners in Indiana own homes of lower median values than non-Hispanic white American homeowners.

Figure D-14.
Denial rates of conventional purchase loans for high-income households, Indiana and the United States, 2007 and 2013

Note:

High-income borrowers are those households with 120% or more of the HUD area median family income (MFI).

Source:

FFIEC HMDA data 2007 and 2013. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: http://www.consumerfinance.gov/hmda/explore

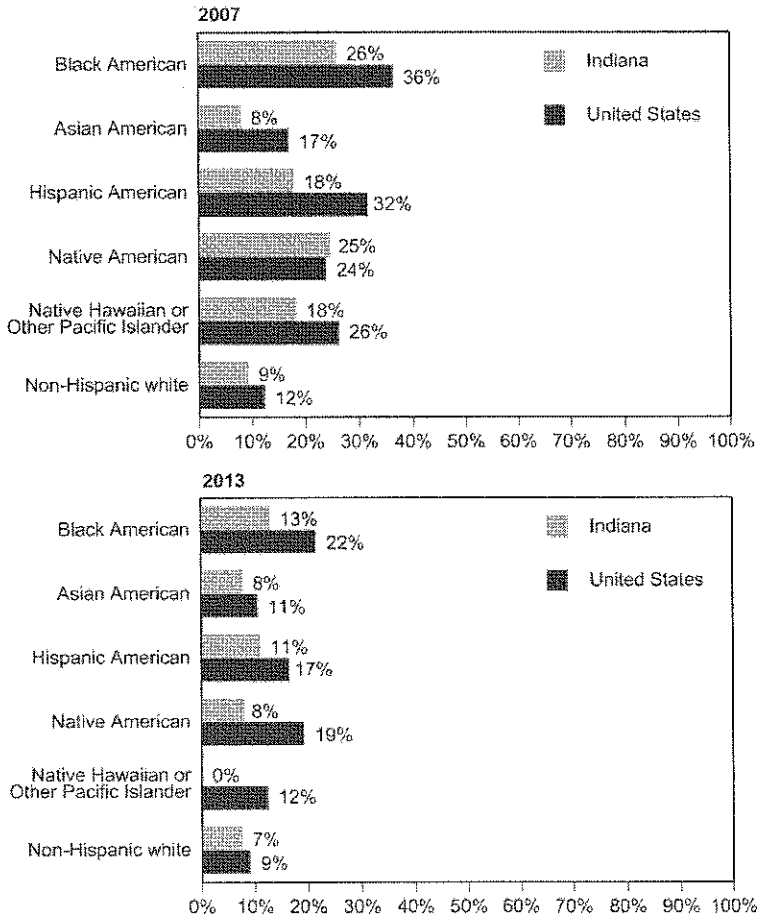


Figure D-14 indicates that in 2013 Black Americans, Asian Americans, Hispanic Americans, and Native Americans in Indiana were denied conventional home purchase loans at a greater rate than non-Hispanic white Americans.

Figure D-15.
Percent of conventional home purchase loans that were subprime, Indiana and the United States, 2007 and 2013

Source:

FFIEC HMDA data 2007 and 2013. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: http://www.consumerfinance.gov/hmda/explore

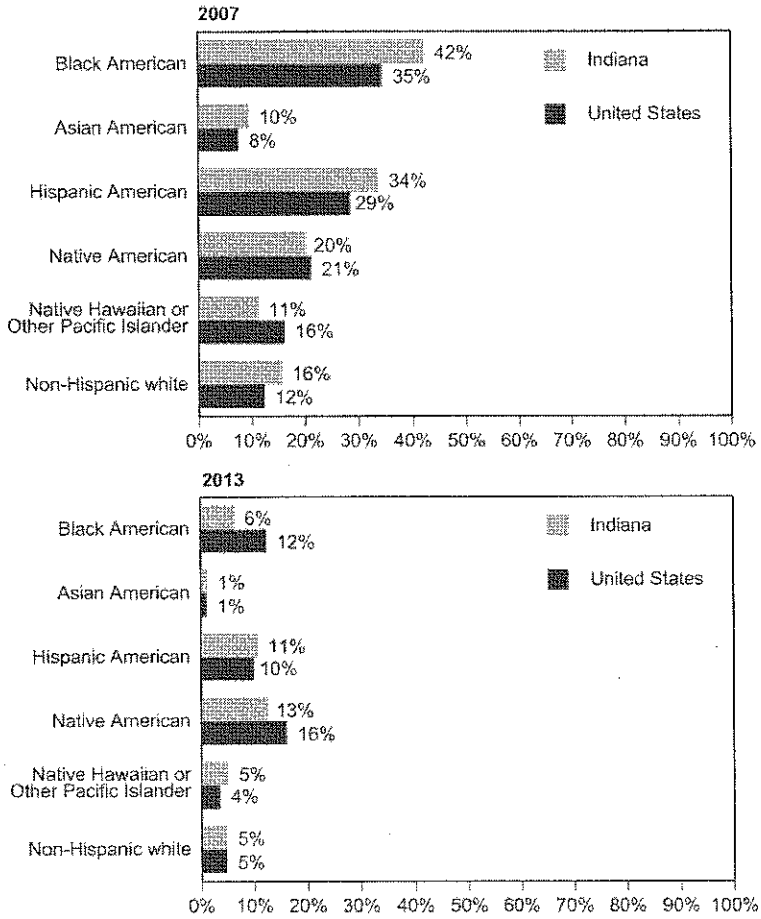
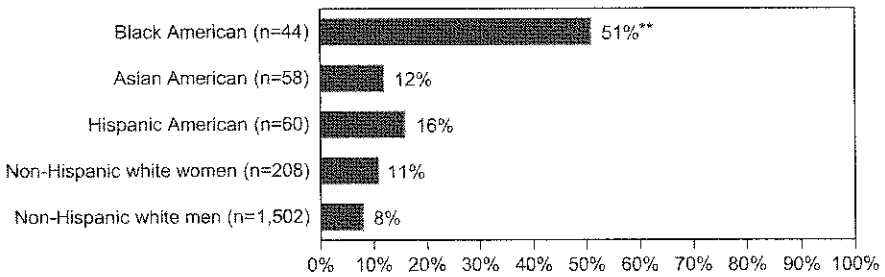


Figure D-15 indicates that in 2013 Black Americans, Hispanic Americans, and Native Americans in Indiana were awarded conventional home purchase loans that were subprime at a greater rate than non-Hispanic white Americans.

Figure D-16.
Business loan denial rates, United States, 2003



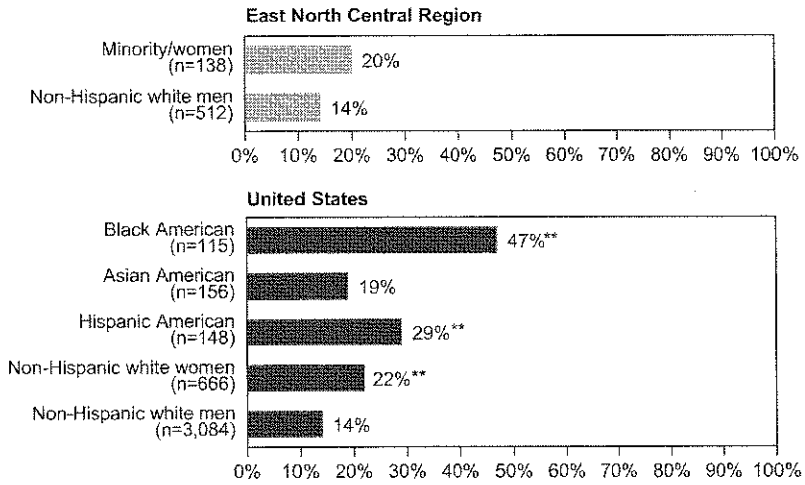
Note: ** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

Small sample sizes prevented analyses of business loan denial rates for the East North Central Region.

Source: BBC Research & Consulting from 2003 Survey of Small Business Finance.

Figure D-16 indicates that in 2003 Black American-owned businesses in the United States were denied business loans at a greater rate than businesses owned by non-Hispanic white men.

Figure D-17.
Businesses that did not apply for loans due to fear of denial, East North Central Region and the United States, 2003



Note:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

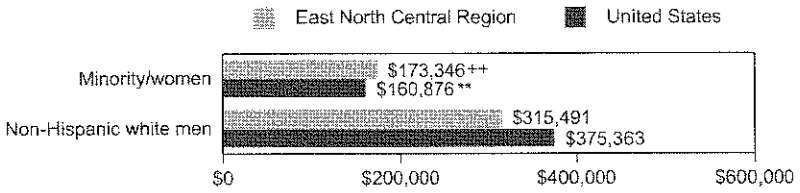
The East North Central Region consists of Indiana, Illinois, Michigan, Ohio, and Wisconsin.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

Figure D-17 indicates that in 2003 Black American-, Hispanic American-, and non-Hispanic white woman-owned businesses in the United States were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial.

Figure D-18.
Mean values of approved business loans, East North Central Region and the United States, 2003



Note: **, ++ Denotes statistically significant differences from non-Hispanic white men (for minority groups and women) at the 95% confidence level for the United States as a whole and the East North Central Region, respectively.

The East North Central Region consists of Indiana, Illinois, Michigan, Ohio, and Wisconsin.

Source: BBC Research & Consulting from 2003 Survey of Small Business Finance.

Figure D-18 indicates that in 2003 minority- and woman-owned businesses in the East North Central Region who received business loans were approved for loans that were worth less than those for which businesses owned by non-Hispanic white men were approved. The study team observed similar results for the United States as a whole.

Figure D-19.
Self-employment rates in study-related industries, Indiana and the United States, 2000

Note:

** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 95% confidence level.

Asian Pacific American, Subcontinent Asian American, and other race minority were combined into the single category of "Other minority group" due to small sample sizes.

Source:

BBC Research & Consulting from 2000 U.S. Census 5% sample Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Indiana	Construction	Professional Services	Goods	Support Services
Race/ethnicity				
Black American	17.3 %	6.3 % **	3.7 % **	3.1 % **
Hispanic American	8.3 **	6.1 **	1.7 **	3.3 **
Native American	18.5	6.6	4.9 *	1.2 **
Other minority group	12.2	9.3	9.2	13.7
Non-Hispanic white	22.5	16.7	6.5	6.0
Gender				
Women	17.8 % **	13.1 % **	4.0 % **	5.0 % **
Men	22.2	17.5	7.1	6.5
All individuals	**21.7 %**	**15.4 %**	**6.2 %**	**5.7 %**

United States	Construction	Professional Services	Goods	Support Services
Race/ethnicity				
Black American	15.2 % **	7.0 % **	2.4 % **	3.8 % **
Hispanic American	12.2 **	8.4 **	4.4 **	5.2 **
Native American	19.2 **	13.9 *	5.6 **	4.6 **
Other minority group	21.6 **	9.4 **	8.7 **	13.1 **
Non-Hispanic white	25.4	17.9	8.1	7.8
Gender				
Women	16.8 % **	13.3 % **	5.1 % **	5.7 % **
Men	23.3	17.8	8.1	8.4
All individuals	**22.6 %**	**15.7 %**	**7.3 %**	**7.1 %**

Figure D-19 indicates that in 2000 Hispanic Americans working in the Indiana construction industry exhibited lower rates of self-employment (i.e., business ownership) than non-Hispanic white Americans. In addition, women working in the Indiana construction industry exhibited lower rates of self-employment than men. Black Americans and Hispanic Americans working in the Indiana professional services industry exhibited lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the Indiana professional services industry exhibited lower rates of self-employment than men. Black Americans, Hispanic Americans, and Native Americans working in the Indiana goods industry exhibited lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the Indiana goods industry exhibited lower rates of self-employment than men. Finally, Black Americans, Hispanic Americans, and Native Americans working in the Indiana support services industry exhibited lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the Indiana support services industry exhibited lower rates of self-employment than men.

Figure D-20. Self-employment rates in study-related industries, Indiana and the United States, 2008-2012

Note:

** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 95% confidence level.

Asian Pacific American, Subcontinent Asian American, and other race minority were combined into the single category of "Other minority group" due to small sample sizes.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Indiana	Self-employment rate			
	Construction	Professional Services	Goods	Support Services
Race/ethnicity				
Black American	21.4 %	6.0 % **	3.4 % **	3.0 % **
Hispanic American	16.8 **	6.0 **	5.4 **	4.5 **
Native American	17.0	0.9 **	8.9	2.6 **
Other minority group	27.9	8.2 **	3.4 **	11.8
Non-Hispanic white	23.9	13.5	6.6	5.0
Gender				
Women	18.1 % **	9.4 % **	5.2 % **	4.6 %
Men	23.8	15.0	6.7	5.2
All individuals	**23.3 %**	**12.2 %**	**6.3 %**	**4.9 %**

United States	Self-employment rate			
	Construction	Professional Services	Goods	Support Services
Race/ethnicity				
Black American	18.8 % **	7.0 % **	3.1 % **	4.3 % **
Hispanic American	17.0 **	9.1 **	4.8 **	5.6 **
Native American	19.8 **	12.8 **	6.0 **	4.3 **
Other minority group	24.1 **	9.1 **	11.2 **	13.2 **
Non-Hispanic white	27.3	16.5	8.3	7.6
Gender				
Women	16.8 % **	11.9 % **	5.5 % **	6.0 % **
Men	24.9	16.0	8.2	8.0
All individuals	**24.2 %**	**14.1 %**	**7.5 %**	**7.0 %**

Figure D-20 indicates that Hispanic Americans working in the Indiana construction industry showed lower rates of self-employment (i.e., business ownership) than non-Hispanic white Americans. In addition, women working in the Indiana construction industry showed lower rates of self-employment than men. Black Americans, Hispanic Americans, Native Americans, and other race minorities working in the Indiana professional services industry showed lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the Indiana professional services industry exhibited lower rates of self-employment than men. Black Americans, Hispanic Americans, and other race minorities working in the Indiana goods industry exhibited lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the Indiana goods industry exhibited lower rates of self-employment than men. Finally, Black Americans, Hispanic Americans, and Native Americans working in the Indiana support services industry exhibited lower rates of self-employment than non-Hispanic white Americans.

Figure D-21.
Predictors of business ownership in construction (regression), Indiana, 2008-2012

Note:

The regression included 9,576 observations.

*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Asian Pacific American, Subcontinent Asian American, and other race minority were combined into the single category of "Other minority group" due to small sample sizes.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa.

Variable	Coefficient
Constant	-1.8217 **
Age	0.0259 **
Age-squared	-0.0001
Married	-0.0374
Disabled	0.0716
Number of children in household	0.0590 **
Number of people over 65 in household	-0.0243
Owns home	-0.0804
Home value ($000s)	0.0008 **
Monthly mortgage payment ($000s)	-0.0490
Interest and dividend income ($000s)	0.0051 **
Income of spouse or partner ($0000s)	0.0018 **
Speaks English well	0.0451
Less than high school education	0.1564 **
Some college	-0.0525
Four-year degree	-0.0030
Advanced degree	0.1067
Black American	-0.0008
Hispanic American	-0.1251
Native American	-0.2742
Other minority group	0.3571
Women	-0.2929 **

Figure D-21 indicates that, compared to being a man in Indiana, being a woman is related to a lower likelihood of owning a construction business, even after accounting for various other personal characteristics.

Figure D-22.
Disparities in business ownership rates for Indiana construction workers, 2008-2012

Group	Self-employment rate		Disparity index
	Actual	Benchmark	(100 = parity)
Non-Hispanic white women	19.5%	27.1%	72

Note: The benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model (see Figure D-21).

Source: BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-22 indicates that non-Hispanic white women own construction businesses in Indiana at a rate that is 72 percent that of similarly-situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).

Figure D-23.
Predictors of business ownership in professional services (regression), Indiana, 2008-2012

Note:

The regression included 7,691 observations.

*, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Asian Pacific American, Subcontinent Asian American, and other race minority were combined into the single category of "Other minority group" due to small sample sizes.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable	Coefficient
Constant	-3.3060 **
Age	0.0064
Age-squared	0.0002
Married	0.1140 *
Disabled	-0.0527
Number of children in household	0.0452 *
Number of people over 65 in household	0.1525 **
Owns home	0.0191
Home value ($000s)	0.0004 **
Monthly mortgage payment ($000s)	0.0369
Interest and dividend income ($000s)	0.0050 **
Income of spouse or partner ($0000s)	0.0011 *
Speaks English well	0.9922
Less than high school education	-0.1819
Some college	0.2000 **
Four-year degree	0.4214 **
Advanced degree	0.6834 **
Black American	-0.2144 *
Hispanic American	-0.2325
Native American	-0.8962
Other minority group	-0.5243 **
Women	-0.2279 **

Figure D-23 indicates that, compared to being a non-Hispanic white American in Indiana, being Black American or other race minority are related to a lower likelihood of owning a professional services business, even after accounting for various other personal characteristics. In addition, compared to being a man in Indiana, being a woman is related to a lower likelihood of owning a professional services business, even after accounting for various other personal characteristics.

Figure D-24.
Disparities in business ownership rates for Indiana professional services workers, 2008-2012

Group	Self-employment rate		Disparity index
	Actual	Benchmark	(100 = parity)
Black American	5.5%	8.2%	67
Other minority group	6.8%	15.2%	45
Non-Hispanic white women	10.6%	14.5%	73

Note: The benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model (see Figure D-23).

Source: BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-24 indicates that Black Americans own professional services businesses in Indiana at a rate that is 67 percent that of similarly-situated non-Hispanic white Americans (i.e., non-Hispanic white Americans who share the same personal characteristics). Similarly, other race minorities own professional services businesses in Indiana at a rate that is 45 percent that of similarly-situated non-Hispanic white Americans. Finally, non-Hispanic white women own professional services businesses in Indiana at a rate that is 73 percent that of similarly-situated non-Hispanic white men.

Figure D-25.
Predictors of business ownership in goods (regression), Indiana, 2008-2012

Note:

The regression included 6,127 observations.

*, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Asian Pacific American, Subcontinent Asian American, and other race minority were combined into the single category of "Other minority group" due to small sample sizes.

The referent for each set of categorical variables variable is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable	Coefficient
Constant	-3.0769 **
Age	0.0299 *
Age-squared	-0.0001
Married	0.0499
Disabled	-0.0519
Number of children in household	0.0588
Number of people over 65 in household	0.1395 *
Owns home	0.0642
Home value ($000s)	0.0011 **
Monthly mortgage payment ($000s)	-0.0862
Interest and dividend income ($000s)	0.0099 **
Income of spouse or partner ($0000s)	-0.0002
Speaks English well	0.2102
Less than high school education	0.0004
Some college	0.0086
Four-year degree	0.0769
Advanced degree	-0.2333
Black American	-0.0824
Hispanic American	0.2976
Native American	0.2066
Other minority group	-0.1244
Women	-0.1307 **

Figure D-25 indicates that, compared to being a man in Indiana, being a woman is related to a lower likelihood of owning a goods business, even after accounting for various other personal characteristics.

Figure D-26.
Comparison of actual business ownership rates to simulated rates for Indiana goods workers, 2008-2012

Group	Self-employment rate		Disparity index
	Actual	Benchmark	(100 = parity)
Non-Hispanic white women	5.4%	6.6%	82

Note: The benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model (see Figure D-25).

Source: BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-26 indicates that non-Hispanic white women own goods businesses in Indiana at a rate that is 82 percent that of similarly-situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).

Figure D-27.
Predictors of business ownership in support services (regression), Indiana, 2008-2012

Note:

The regression included 13,256 observations.

*, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Asian Pacific American, Subcontinent Asian American, and other race minority were combined into the single category of "Other minority group" due to small sample sizes.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable	Coefficient
Constant	-3.9224 **
Age	0.0771 **
Age-squared	-0.0006 **
Married	0.2421 **
Disabled	-0.1528 *
Number of children in household	0.0305
Number of people over 65 in household	0.0273
Owns home	0.1397 *
Home value ($000s)	0.0008 **
Monthly mortgage payment ($000s)	0.1237 **
Interest and dividend income ($000s)	0.0087 **
Income of spouse or partner ($0000s)	0.0001
Speaks English well	-0.0368
Less than high school education	0.0658
Some college	-0.0121
Four-year degree	0.1797 **
Advanced degree	-0.0776
Black American	-0.0776
Hispanic American	0.0598
Native American	-0.2637
Other minority group	0.3887 **
Women	-0.0360

Figure D-27 indicates that, compared to being a non-Hispanic white American in Indiana, being an other race minority is related to a higher likelihood of owning a support services business, even after accounting for various other personal characteristics.

Figure D-28.
Rates of business closure, expansion, and contraction, Indiana and the United States, 2002-2006

Note:

Data include only non-publicly held businesses.

Equal Gender Ownership refers to those businesses for which ownership is split evenly between women and men.

Statistical significance of these results cannot be determined, because sample sizes were not reported.

Source:

Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

Lowrey, Ying. 2014. "Gender and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

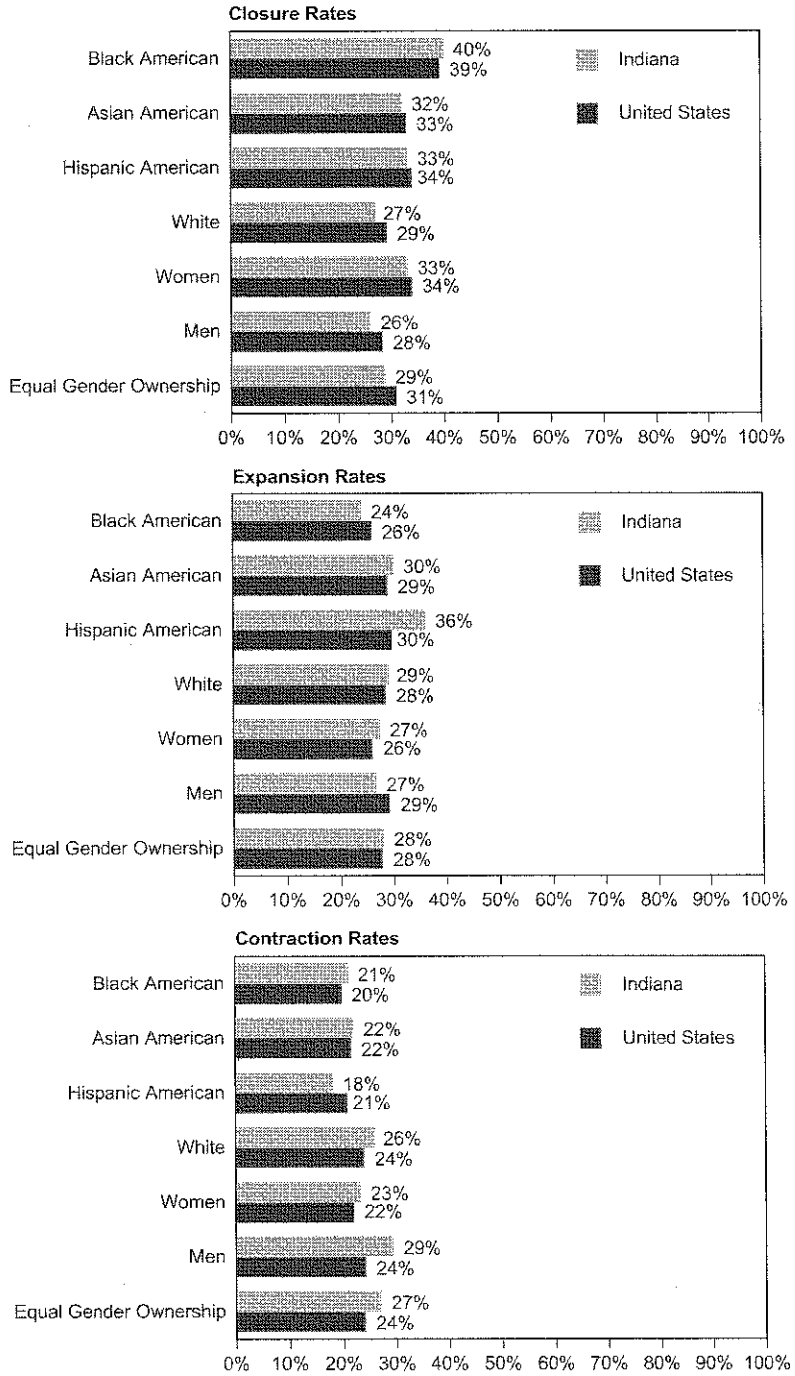


Figure D-28 indicates that Black American-, Asian American-, and Hispanic American-owned businesses in Indiana show higher closure rates than white American-owned businesses. Woman-owned businesses in Indiana show higher closure rates than businesses owned by men. Black American-owned businesses in Indiana show lower expansion rates than white American-owned businesses. Finally, Black American-, Asian American- and Hispanic American-owned businesses in Indiana show lower contraction rates than white American-owned businesses. Woman-owned businesses in Indiana show lower contraction rates than businesses owned by men.

Figure D-29.
Mean annual business receipts (in thousands), Indiana and the United States, 2007

Note:

Includes employer and non-employer firms. Does not include publicly-traded companies or other firms not classifiable by race/ethnicity and gender.

Source:

2007 Survey of Business Owners, part of the U.S. Census Bureau's 2007 Economic Census.

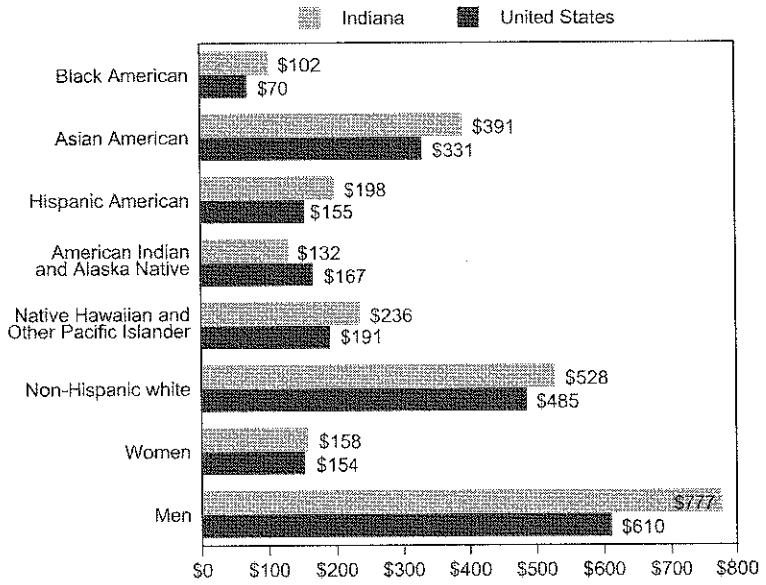


Figure D-29 indicates that in 2007 Black American-, Asian American-, Hispanic American-, Native American-, and Native Pacific Islander-owned businesses in Indiana showed lower mean annual business receipts than non-Hispanic white American-owned businesses. In addition, woman-owned businesses in Indiana showed lower mean annual business receipts than businesses owned by men.

Figure D-30.
Mean annual business owner earnings, Indiana and the United States, 2008-2012

Note:

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2012 dollars.

**, ++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level for the United States as a whole and Indiana, respectively.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

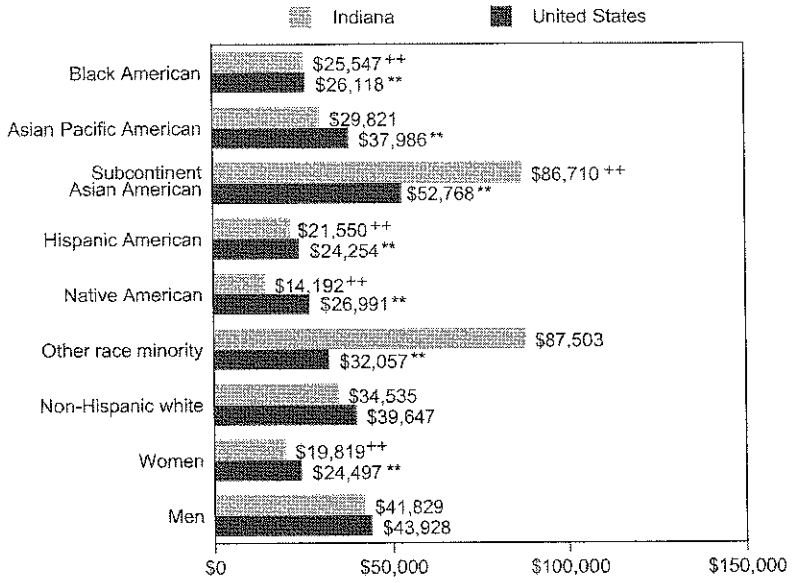


Figure D-30 indicates that the owners of Black American-, Hispanic American-, and Native American-owned businesses in Indiana earned less on average than the owners of non-Hispanic white American-owned businesses. In addition, the owners of woman-owned businesses in Indiana earn less on average than the owners of businesses owned by men.

Figure D-31.
Predictors of business owner earnings (regression), Indiana, 2008-2012

Note:

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2012 dollars.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable	Exponentiated Coefficient
Constant	269.550 **
Age	1.178 **
Age-squared	0.998 **
Married	1.307 **
Speaks English well	1.111
Disabled	0.594 **
Less than high school	0.730 **
Some college	1.031
Four-year degree	1.265 **
Advanced degree	1.914 **
Black American	0.738 **
Asian Pacific American	1.054
Subcontinent Asian American	2.096 **
Hispanic American	1.333 **
Native American	0.515 **
Other race minority	0.656
Women	0.433 **

Figure D-31 indicates that, compared to being the owner of a non-Hispanic white American-owned business in Indiana, being an owner of a Black American- or Native American-owned business is related to lower earnings, even after accounting for various other business and personal characteristics. In addition, compared to being the owner of a business owned by men in Indiana, being an owner of a woman-owned business is related to lower earnings, even after accounting for various other business and personal characteristics.

Figure D-32.
Predictors of business owner earnings (regression), United States, 2008-2012

Note:

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2012 dollars.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable	Exponentiated Coefficient
Constant	446.865 **
Age	1.156 **
Age-squared	0.999 **
Married	1.258 **
Speaks English well	1.166 **
Disabled	0.593 **
Less than high school	0.730 **
Some college	1.062 **
Four-year degree	1.340 **
Advanced degree	2.130 **
Black American	0.851 **
Asian Pacific American	1.123 **
Subcontinent Asian American	1.152 **
Hispanic American	1.061 **
Native American	0.706 **
Other race minority	1.091
Women	0.519 **

Figure D-32 indicates that, compared to being the owner of a non-Hispanic white American-owned business in the United States, being the owner of a Black American- or Native American-owned business is related to lower earnings, even after accounting for various other business and personal characteristics. In addition, compared to being the owner of a business owned by men in the United States, being the owner of a woman-owned business is related to lower earnings, even after accounting for various other business and personal characteristics.

APPENDIX E.
Qualitative Information about Marketplace Conditions

Appendix E presents qualitative information that the study team collected and analyzed as part of the disparity study. More than 600 business and trade association representatives provided input for Appendix E, which includes the following ten parts:

A. Introduction describes the process for gathering and analyzing the information summarized in Appendix E. *(page 2)*

B. Background on Construction; Professional Services; and Goods and Support Services Industries summarizes information about how businesses become established and how companies change over time. Part B also presents information about the effects of the economic downturn and business owners' experiences pursuing public and private sector work. *(page 4)*

C. Keys to Business Success summarizes information about certain barriers to doing business and keys to success including access to financing, bonding, and insurance. *(page 32)*

D. Doing Business as a Prime Contractor or as a Subcontractor summarizes information about the mix of businesses' prime contract and subcontract work and how they obtain work. *(page 58)*

E. Potential Barriers to Doing Business with Public Agencies presents information about successes and potential barriers to doing work in general and specifically for Indiana state entities. *(page 72)*

F. Indiana State Agencies and Public Colleges presents information about experiences related directly to working with the Indiana Department of Administration (IDOA), the Indiana Department of Transportation (INDOT), the Indianapolis Airport Authority (IAA), the Indiana State Lottery Commission (Hoosier Lottery), and seven state educational institutions (SEIs) (referred to collectively as *participating entities*). *(page 102)*

G. Other Allegations of Unfair Treatment presents information about any experiences with unfair treatment such as bid shopping; treatment during performance of work; stereotypical attitudes about minorities and women; and allegations of a "good ol' boy" network that adversely affect opportunities for minority- and woman-owned businesses. *(page 110)*

H. Insights Regarding any Race-/Ethnicity- or Gender-based Discrimination includes additional information concerning potential race-/ethnicity- or gender-based discrimination. Topics include stereotypical attitudes about minorities and women and allegations of a "good ol' boy" network that adversely affects opportunities for minority- and woman-owned businesses. *(page 119)*

I. Insights Regarding Business Assistance Programs, Changes in Contracting Processes, or Any Other Neutral Measures presents information about business assistance programs, efforts to open contracting processes, and other steps to remove barriers to all businesses or small business. *(page 128)*

J. Insights Regarding MBE/WBE and DBE Programs or Any Other Race-/Ethnicity- or Gender-based Measures presents information about the State of Indiana's Minority and Women's Business Enterprises (MBE/WBE) Program and the Federal Disadvantaged Business Enterprise (DBE) Program including any impacts of MBE/WBE or DBE contract goals on other businesses. It also presents information about advantages and disadvantages that subcontractors experience because of their certification as MBE/WBEs or DBEs. *(page 153)*

K. MBE/WBE/DBE Certification presents comments on the processes for MBE/WBE and DBE certification and other certifications. *(page 162)*

L. Any Other Insights and Recommendations Concerning Indiana Contracting or MBE/DBE Program presents suggestions for Indiana state entities to improve implementations of their small business or MBE/WBE/DBE programs. It also presents other related insights and recommendations. *(page 176)*

A. Introduction

Business owners and managers; trade association representatives; and other interested parties had the opportunity to discuss their experiences working in the Indiana marketplace by participating in one or more of the following:

- In-depth interviews;
- Availability surveys;
- Public forums; and
- Written testimony.

The study team conducted in-depth interviews and availability surveys from March 2015 through August 2015. IDOA and BBC Research & Consulting (BBC) held public forums in January 2015 in Indianapolis, Gary, and Evansville at which the study team solicited verbal and written testimony concerning the 2015-16 State of Indiana Disparity Study. In addition, BBC collected written and verbal testimony from interested parties throughout the study.

In-depth interviews. The study team conducted in-depth interviews with 71 Indiana businesses and four trade associations. The interviews included discussions about interviewees' perceptions and anecdotes regarding the local contracting industry; the State of Indiana's MBE/WBE Program; the Federal DBE Program; and experiences working or attempting to work with Indiana state entities. Interviews were conducted by Briljent, a Fort Wayne-based WBE-certified consulting firm, and Bingle Research Group, an Indianapolis-based veteran business enterprise (VBE)-certified market research firm.

Interviewees included individuals representing construction businesses; professional services firms; goods and support services providers; and trade associations. The study team identified interview participants primarily from a random sample of businesses that was stratified by business type, location, and the race/ethnicity and gender of the business owners. The study team conducted most of the interviews with the owner, president, chief executive officer, or other high-level manager of the business or association. Some of the businesses that the study team interviewed work exclusively (or, at least primarily) as prime contractors or subcontractors, and some work as both. All of the businesses conduct work in Indiana. All interviewees are identified in Appendix E by random interviewee numbers (i.e., #1, #2, #3, etc.).

In order to protect the anonymity of individuals or businesses mentioned in interviews, the study team has masked any comments that could potentially identify specific individuals or businesses. In addition, the study team indicates whether each interviewee represents an MBE-, WBE-, or DBE-certified business and also reports the race/ethnicity and gender of the business owner.[1]

Availability surveys. As a part of availability surveys that the study team conducted for the disparity study, the study team asked firm owners and managers whether their companies have experienced barriers or difficulties associated with starting or expanding businesses in their industries or with obtaining work. A total of 555 businesses provided comments. The study team analyzed responses to those questions and provided examples of different types of comments in Appendix E. Availability survey comments are indicated throughout Appendix E by the prefix "AI." For details about availability surveys, see Chapter 5 and Appendix C.

Public forums. In January 2015, IDOA and the study team solicited written and verbal testimony at public forums across the state. Public forums were held on the following dates in the following locations:

- Gary—January 27, 2015;
- Indianapolis—January 28, 2015; and
- Evansville—January 29, 2015.

The study team reviewed and analyzed comments from those meetings and provided examples in Appendix E. Public forum comments are indicated throughout Appendix by the prefix "PF."

Written testimony. All written testimony received by e-mail was analyzed by the study team and is provided in Appendix E. Written testimony is indicated throughout Appendix E as "WT."

[1] Note that "male" or "white" are sometimes not included as identifiers to simplify the written descriptions of business owners.

B. Background on Construction; Professional Services; and Goods and Support Services Industries in Indiana

Part B summarizes information related to:

- How businesses become established *(page 4)*;
- Challenges in starting a business *(page 5)*;
- Types of work that businesses perform *(page 11)*;
- Employment size of businesses *(page 14)*;
- Capability of businesses to perform different types and sizes of contracts in different parts of the state *(page 15)*;
- Local effects of the economic downturn *(page 18)*;
- Current economic conditions *(page 23)*; and
- Business owners' experiences pursing public and private sector work *(page 25)*.

How businesses become established. Most interviewees reported that their companies were started (or purchased) by individuals with connections in their respective industries.

Many business owners worked in the industry or a related industry before starting their own businesses. [e.g., #5, #8, #17, #19, #23, #26, #29, #31, #32, #33, #34, #35, #38, #40, #44, #53, #55, #56, #60, #64, #65, #66] Examples from the in-depth personal interviews include the following:

- The non-Hispanic white female owner of a WBE-certified professional services firm stated that she worked for the firm for two years before she became the owner. The previous owner wanted to retire and offered to sell the business to her. She reported that the former owner continued to work at her business as a part-time consultant for a period of time after she purchased the business. [#4]
- A Subcontinent Asian American owner of an MBE- and SBE-certified construction firm stated that he began the business after being laid off from another company. At that time, there were no other jobs available. He reported, "I had side-work clientele, so that is how I started. I started up with my side-work clientele." [#12]
- A non-Hispanic white male owner of a construction firm reported that he was previously a manager for another business. He noted that while he was working for that company, he did some side work and had a customer list and the necessary tools and equipment. He said, "I felt that this was the time to give it a shot and started my own business. It was like stepping off the end of the earth." [#18]
- A Subcontinent Asian American owner of a non-certified professional services firm reported becoming a business owner by identifying a well-established business that he was able to purchase. He noted that with this company and site, the business was already up and running and he did not need to start from scratch. [#21]

- A Black American male owner of an MBE-certified specialty contracting firm indicated that he had always been interested in working in construction. He said, "My wife's family owned a construction company ... and I worked on various things for them. I've always been around it." He added that, because of the work he did with his wife's family business, he was always comfortable with the construction industry. [#22]
- The non-Hispanic white female owner of a WBE-certified professional services firm reported that she was the first female partner in the company, and that she bought a majority share when the original partners retired. [#30]
- A Hispanic American male owner of a non-certified specialty contracting firm reported that he previously worked for another specialty construction company. He said that when he was fired he decided it was time to start his own business. He went on to add that he reached out to a couple of contacts and borrowed money. [#41]
- A Hispanic American male owner of a non-certified professional services firm reported that his exposure to business principles through other jobs contributed greatly to his success. [#43]
- A Subcontinent Asian American male owner of an MBE-certified professional services firm reported that both he and his wife had a background in the field before starting their own firm. [#49]
- The non-Hispanic white female owner of a WBE-certified professional services firm reported that she had previously worked for a similar company. When she was let go from the company, she decided to start a business to put her knowledge to use. [#56]
- A Native American male owner of a non-certified construction firm stated that he has worked in the construction industry since age 16, and gradually learned all aspects of the business. He also noted that he earned a relevant certificate. [#71a]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm reported that she has been in the industry for over 30 years. [#73]
- The non-Hispanic white male owner of a construction firm stated that many of his family members have worked in the industry. His grandfather and his father performed this type of work. He said that he has worked in construction since he was a teenager. Now his son is also in the business. [#75]
- A non-Hispanic white female owner of a WBE-certified construction firm said, "I've been in the building industry for [many] years but went out on my own ten years ago ..." [PF#10]

Challenges in starting, operating, and growing a business. Interviewees' comments about the challenges in starting, operating, and growing a business varied.

For some, securing opportunities was particularly difficult, especially at start-up. For example:

- A Subcontinent Asian American male owner of an MBE-certified professional services firm reported that the biggest challenge for a firm like his is "getting the first job." [#49]
- The non-Hispanic white female owner of a WBE-certified professional services firm said that, when she decided to start her own business, she had the knowledge and expertise, but not the contacts. She added that the first few years of her business were nothing but networking and stated that she "got one contract that [first] year and did it all on [her] own." [#5]
- A Hispanic American female owner of an MBE- and WBE-certified professional services firm reported that she started working on state contracts, and that it was tough at first to find out about the opportunities and projects. She commented, "No one tells you about them. But I'm an observer and was watching to see how it was done. We started putting out our feelers and started being a subcontractor ..." [#7]
- When asked about the challenges of starting a business, a non-Hispanic white male owner of a construction firm reported that the lack of a consumer base is the biggest challenge for new businesses like his. He added, "We're all fighting for the same few clients as it is. I can tell you that in Indiana, there are way too many contractors still in my industry. Illinois has about half a dozen. We still have a dozen in Indiana." [#61]
- A Black American female owner of a MBE- and WBE-certified specialty contracting business reported that competition from large business is a challenge. She said, "It is extremely difficult to be successful when attempting to compete with large businesses." [WT#1]

Many reported a combination of challenges in starting, sustaining, or growing their business. Some businesses faced a number of barriers including time management, financing, job size, timely payment, and other factors:

- A non-Hispanic white male owner of a construction firm reported that insurance coverage and safety requirements can sometimes pose problems for his business. He went on to add that he lost two big projects because they required him to sign up for a safety program and to take a safety course. There was a high cost for the safety course and a $5 million liability requirement. He did not bid on the job because of those high costs. Conversely, in the private sector, insurance requirements are not as strict. He commented that he performs work for two multi-national, multi-million dollar private companies, and that they only need $2 million in liability coverage. [#18]

  The same interviewee pointed out that at a public institution, engineers that controlled the contracts got "favors" from the bidding companies. He went on to say that when he was working in Indianapolis with a large firm, certain companies offered gifts to the engineers awarding the contract in order to get those contracts. He stated, "That is what I ran into here with [public institutions]." [#18]

- A non-Hispanic white male owner of a goods and services firm reported that a challenge for his business is that he competes against larger service companies. However, he indicated that he provides better personal service. He stated, "My competitors, if a customer is not a big customer, they'll go right on by them to the next stop. I'd rather have ten small customers than one big one." [#31]

  When asked about challenges in the private sector, he stated that those customers are very loyal. He went on to say, "It's tough to get in, but once you get in, you've got them for a long time." [#31]

- When discussing the barriers for small businesses to secure work in the private or public sector, a Black American owner of a non-certified specialty contracting firm reported that having the capital to purchase equipment and to pay subcontractors is the biggest barrier. [#40]

- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners reported that some of their members are unsure of how to properly expand their business. She reported, "They get to a point, and they're not sure how to take [owning a business] a step further." She added that the challenge for members figuring out how to grow the business without it taking over their entire lives. She stated, "Most of them are running their businesses, taking their kids to school ... and still running a business full time. So there are family issues." [#45]

  The same interviewee also reported that lack of capital is sometimes a barrier for women business owners. She stated, "It is becoming even more difficult with the larger institutions. We're finding more success with smaller local banks. The comments have been made that if it was a man coming to the table with the same business plan [the outcome would be different] ... It's a little tougher being a woman." [#45]

- A Black American male owner of an MBE- and DBE-certified specialty contracting firm indicated that his firm has not grown since he started it in 2006. He stated, "The work just [has not] been there." [#48]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated that getting your "foot in the door" with companies is a major challenge when starting a business. She reported, "Most of the companies have their preferred vendors now, and they are used to using them. They've got enough for triple quotes ... They've built a relationship with those different companies, and it's hard to get your foot in the door and build a relationship with them when they are pretty much set. It took me about five years to get my foot in the door." [#56]

Many interviewees reporting facing financial barriers when they started their business as well as during the years that followed business initiation. Some interviewees faced challenges securing access to working capital and other financing and timely payments.

- A non-Hispanic white female representative of a majority-owned specialty contracting firm reported that new businesses would have a lot of trouble trying to do what her firm does. She reported, "Funding ... [and] bonding would be huge

[issues] ... If they weren't hugely successful beforehand, I don't see how they would get started if they didn't have cash in the bank sitting somewhere to back those bonds up. Manpower, equipment ... I mean, all of that ... I wouldn't tell anyone to start [a firm like mine]." [#44]

- A Black American female owner of an MBE-certified professional services firm reported, "Financing is very important because you have to pay your bills and 941s ... Being an owner is not fun." [#29]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm reported that the main challenges associated with starting a small business in his industry are the financing and the initial start-up costs. He went on to say that there is a lot specific equipment required in order to be efficient and compete with the larger crews. He also commented that you need to find a bank to provide financing. [#32]
- The non-Hispanic white female owner of a WBE-certified goods and services firm reported that she had to start her business on her own with an initial investment of $2,000 of her own money. [#1]
- A Hispanic American male representative of a DBE-, MBE-, SBE- and WBE-certified construction firm owned by a Hispanic American female reported that the biggest challenge to getting started in the industry is having the necessary funding or capital. [#3b]
- A Subcontinent Asian American male representative of a non-certified professional services firm owned by a Subcontinent Asian American female indicated that there are many challenges when starting out as a small business. He stated, "It's a lot of expenses to start a company, to manage it, and help it grow. Then, it is very difficult to become a prime vendor in a company. You have to know someone to become a prime vendor." [#9b]
- A non-Hispanic white male representative of a majority-owned goods and services firm reported that the owner had to partner with his cousin, who is a specialist in an unrelated field, in order to obtain the necessary start-up costs for his business. [#20]
- The non-Hispanic white male veteran owner of a service-disabled veteran-owned small business (SDVOSB)-certified construction firm indicated that funding would be a major issue for anyone starting a business. He stated, "Some of it's high-interest, [and] some of it is hard to get, especially back in the downturn. You could hardly borrow money." He added, "When you start a new company, [often] you can't borrow money, [and] you can't get bonded because you are not worth anything." [#57]
- A Black American female owner of an MBE- and WBE-certified professional services firm reported that funding is still an issue. She stated, "If people perceive that you can't handle the weekly payrolls ... [you're in a bad spot]." [#65]
- The Hispanic American male chair of an Indiana minority-focused business council reported that access to capital is an issue, especially for small businesses. He stated,

"We see this every day. We have people coming up to us with that issue—access to capital, how to get a grant, how to do this. When you are starting something, it is so hard to get access to capital even though you may have a beautiful business plan and something to show [that] you will be a successful business. I think [that is] because it is still a question mark. Even if you bring me a beautiful business plan, it's not the same as if you can show me your finances and show me your bank statement. I think as a startup, you run into those issues." [#46]

- The non-Hispanic white male representative of an Indiana small business development center reported that many small business owners underestimate the necessity of conducting thorough research in order to make a business a success. He stated, "It is going about it the right way. It is not maxing out your credit cards right away. It is learning about the funding streams that are available. And, if you do have bad credit ... then [see] how [you can] get your credit back on track. It is mostly those things." [#47]

A number of businesses reported government "red tape" and regulations as barriers to starting, operating, and growing their business. Examples include:

- A non-Hispanic white male veteran owner of a non-certified construction firm indicated that the state does not make it easy for anyone to start a business. He commented that he thought getting registered with the Secretary of State's office was easy. He added that there were things he was not aware of when starting his business, and that consequently, he was in violation of the law. He stated, "I didn't know I was in violation. But ignorance is no excuse. I'm sure other small businesses, like me, whether they are contractors or not, run into the same thing unless they have a sharp attorney who explains these things to them." [#10]

  The same veteran business owner also noted that there are things the state could do to make it easier to start a business. When asked about suggestions for improvement, he stated, "Let people know that you have to re-submit their paperwork every three years to maintain your corporate status. Have a checklist for businesses to follow. Let them know if there are certain licenses they need for their type of business." [#10]

- A non-Hispanic white male owner of a goods and services firm indicated that it can be a challenge to deal with large companies that want him to have various insurance coverages that he does not need. He gave the example of workman's compensation. He said that he does not need it because he is an independent contractor without employees. He commented, "So, I may resign from the contract just from a bureaucracy standpoint." [#31]

Some interviewees reported an easier time of starting a business. For example, when asked about challenges in starting a firm in the industry, a Black American male owner of a non-certified specialty services firm commented that he did not face many challenges because his predecessor had previously established clients and relationships. [#16]

Some interviewees explained that perceived incentives for MBEs/WBEs/ DBEs/SDVOSBs was one factor that encouraged starting those businesses. For example:

- A Black American owner of an MBE-certified goods and services business reported, "I did some research [on certification] and got certified as an MBE with the state. That's how I started off." [#27]
- The non-Hispanic white male veteran owner of a SDVOSB-certified contracting firm stated that he learned about the incentives from another service-disabled veteran. That person told him about set-asides that the government had for SDVOSB businesses. The interviewee went on to report that he had some equipment, so he started bidding on jobs. [#57]

Some businesses reported that simply being a minority- or woman-owned business made starting and growing a business more difficult. For example:

- A Black American female owner of an MBE- and WBE-certified professional services firm reported, "Challenges of starting the business, being a minority and being a woman, is that you often get pigeonholed. I get more calls from people of color than the other way around." She went on to say, "when you are a subcontractor, making sure you are not just a pass-through, and you really are doing the work and [the prime is] meeting with you and keeping you engaged. That's a challenge." [#2]
- A Hispanic American female owner of an MBE- and WBE-certified professional services firm expressed that she believes there are additional barriers to being a woman- and minority-owned business. She stated, "People try to pigeonhole you. People think you only do [marketing for minorities]. No, that's not true, we're [just a business]. If you think [working with minorities] is all we do, you're mistaken." [#7]

  When asked about any specific barriers as a small or minority-owned business, the same interviewee stated, "Some [people] stereotype you and choose to go with the long-standing firm that is not minority-owned. But sometimes people are willing to take a chance, and that is really nice." [#7]
- A Black American female owner of an MBE-certified professional services firm indicated that she has a lot of competition in the marketplace. She commented, "By me being [a] minority, black, it's extra hard." [#29]
- The Black American male owner of an MBE-certified specialty services firm stated that one challenge for minority-owned businesses is being properly prepared to operate the business. He commented that he sometimes sees people who believe that just because they are a minority and have the minority certification, the world is going to open [up] to them. They mistakenly believe that they can run a successful business without having the proper training. [#6]
- The non-Hispanic white female owner of a WBE-certified professional services firm noted that it can be difficult for a woman-owned business when two long-time male business partners leave. She stated, "It has to do with a lot of established

relationship[s]. These guys have known each other for years and years. It's really hard. Even though they introduce me, there is still an established network of people who just know each other ... and a lot of them are men ... It's hard to break into that." [#30]

- A Black American male owner of a non-certified specialty contracting firm indicated that an additional barrier to starting a minority-owned small business is not knowing the right people. He commented that "who you know" is important when obtaining work, and that minorities do not always have opportunities to network with "influential people." [#40]
- When asked if he thinks there are challenges to being minority-owned, a Black American male owner of an MBE- and DBE-certified specialty contracting firm stated, "I don't think they want me in there." He reported that he has been refused work because his firm is minority-owned. [#48]
- A Black American female owner of an MBE- and WBE-certified professional services firm stated that starting her business was difficult. Financing and cash flow were big issues. She also indicated that there were some race-related issues, and that her field of business is very male-dominated making it difficult for women to enter. She stated, "Women and minorities have a hard time getting funding for their businesses not just locally, but nationally." She went on to add, "I had to have my husband sign. If you are childbearing, it is really bad." [#65]

  The same interviewee went on to report, "I think there were clearly some race issues. You know, it's always been said that woman-owned and minority-owned businesses don't have the quality that majority-owned businesses have that are run by males. Whether that is the card that somebody throws out there to keep you from getting business, in some respects, it turns into reality because people say it so much that without your documented proof, you can't refute it." [#65]
- The Black American owner of a non-certified professional services firm said, "As a small business ... you are undercapitalized, and that's the first issue you wind up confronting. The second ... is that you wind up confronting the skill sets required to participate in the industry, and either you have them, or you have to work in areas in which you have the skills ... That's one of the disparities as a small business .... The bulk of Black participants ... [their] skill training is shortened." [#67]

  The same interviewee went on to comment, "We are not an MBE in any sense of the word. All we do is work hard. Our biggest issue is that disparity begins with both being a small business as well as being a minority business. The concept of a minority doing business is [that you have] to be certified as a minority. Being black is insufficient. That's a problem." [#67]

Types of work that businesses perform. Interviewees discussed whether and why over time their firms changed the types of work that they perform.

Several interviewees indicated that their companies had changed or expanded their lines of work to respond to market conditions or to fill an open niche. [e.g., #7, #8, #14, #20, #25, #26, #43, #62a, #66, #73] For example:

- A Black American female owner of an MBE- and WBE-certified professional services firm reported that there have been changes in the type of work the company has performed over time. When the firm first started, there was project work that grew into retaining clients and working on more long-term, complex projects. She reported, "We're starting to see more retainers and more long term engagements, rather than quote, unquote, one-offs ... The work is becoming more complex." She added, "We're seeing clients that want more diversity in their services. They want marketing, they want social media, and they want advertising. We're seeing more integration of diversity in the clients' requests." [#2]
- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female reported that the firm started with small jobs in order to make a name for themselves in the industry and to establish themselves in the community. One large, commercial project in particular pushed their company forward and put them "on the map, in the community." [#3a]
- The non-Hispanic white male representative of a majority-owned specialty contracting firm reported that the firm has changed a lot over the years. He stated, "We have always been a firm that is engaged in education of some sort. Even since the early 1960s we did school projects. With the advent of our growth and stabilization in the 1970s, we did a lot of private projects. In the recession in 1983, ... We lost all our private work. It just stopped. It became clear [that] we had to do something different." [#17]
- The non-Hispanic white female owner of a construction firm indicated that the size of the company has changed over time. She commented that in 1995 they had 53 employees, and that they now have 23. She went on to report that the firm has downsized because several of their past clients went out of business in a single year including two of their largest. [#24]
- A non-Hispanic white male owner of a goods and services firm stated that the original owner started the company as a highly specialized electrician. Over time, the original owner took classes and learned more. From there, the firm expanded. [#28]
- The non-Hispanic white female owner of a WBE-certified professional services firm reported that the type of work they do has changed over time. "It changes with the economy ... We have to be flexible." [#30]
- A Hispanic American male owner of a non-certified goods and services firm reported that his business has changed over time. His firm started out doing commercial and industrial work. Because of the recession in 2008, his business started doing more residential work due more prompt payment from residential customers. He commented, "Residential work [usually] paid when you finished, but

our commercial customers were paying 30, then 45, then 60, and even 120 days out because money was so tight. Cash flow was critical. So, we started doing more residential to improve the cash flow." [#33]

- A non-Hispanic white male representative of a majority-owned specialty contracting firm stated that the increase in the size of the company was largely due to pursuing and obtaining contract work with INDOT. [#54]
- The non-Hispanic white male owner of a specialty contracting firm reported that his company originally did only one type of construction work. Seven years ago, he started another type of work due to an identified need. [#59]
- A non-Hispanic white male owner of a construction firm reported, "Our scope of work, the way we do things, has changed over the years. There [have] been a lot of changes throughout the ... industry that maybe the ordinary person wouldn't have seen in the last 20 years. Some of it's due to regulations, government, [the] State. Some of it's due to changes within the industry itself ..." [#61]
- A Black American representative of an MBE-certified goods and services firm indicated that the company has changed significantly over time. The company began with a small retail kiosk in a mall. There was only one employee at the time. By 1994, there were 50 stores throughout Indiana. The company now has over 1,500 employees on the corporate side and has locations across the country. The company started with one product and expanded into multiple lines of business. [#69]
- A Subcontinent Asian American owner of a DBE- and MBE-certified professional services and construction firm commented that they started the business as a [specialty] consulting firm. They expanded due to market demand and growing business relationships. They also started a companion services firm as well as general contractor services. [#74]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm indicated that the type of work they do changes frequently. She added, "It is a very fast-changing industry. There are changes every day. It has a lot to do with computers ..." [#36]
- The non-Hispanic white female owner of a WBE- and DBE-certified specialty contracting firm reported, "We are WBE-/DBE-certified, [and we] started the company in 2007 just with myself as sole proprietor. In 2009, [the company] became a corporation and added a woman partner to the business. That's made a huge difference in our cash flow and being able to buy our trucks and things like that." [PF#13]

Some businesses reported that they have seen little change in the type of work they do. [e.g., #10, #35, #49] Examples of interviewee comments include:

- A non-Hispanic white male owner of a goods and services firm indicated that while he has been providing the same service for years, they have tripled business over

the last four years. He added that he bought another company that provided similar services four years ago. His firm has been adding more customers every year. [#31]

- The non-Hispanic white male owner of a specialty contracting firm reported that his firm has been performing the same work since it started in the 1960s, and that its size has not changed much over time. [#60]

Some interviewees reported recent changes in the type of work they perform. Examples of comments include:

- A non-Hispanic white male veteran owner of a VBE-certified professional services firm noted that his business has changed from performing 50 percent public work and 50 percent private work to now performing 10 percent public and 90 percent private. He said that is due to the firm temporarily losing its disabled veteran certification with the city. [#32]
- The non-Hispanic white male representative of a majority-owned specialty contracting firm reported that the type of work the company performs has changed over time and has changed even more in recent months. He stated, "I am now getting leads from large general contractors. Those are quality leads. There are only three or four companies I'm bidding against, whereas a lot of the stuff on the street may have seven to nine bidders." He added that he is now on the approved vendor list for several large customers. [#17]

Employment size of businesses. The study team asked business owners about the number of people that they employed and whether their employment size fluctuated.

A number of companies reported that they expand and contract their employment size depending on work opportunities, season, or market conditions. Comments include:

- A Black American female owner of an MBE- and WBE-certified professional services firm reported, "I use contract employees as my business model right now, and that was intentional after going through the buyout and reorganization. I decided not to hire immediately until we had more stability, and I see my stable of contract employees growing." [#2]
- A Subcontinent Asian American male owner of an MBE- and SBE-certified construction firm reported that the business has fluctuated in size. He began the business by himself. By 2007, he employed five other electrical contractors. He is now down to two other contractors plus himself. [#12]
- The Hispanic American owner of an MBE-certified construction firm reported that his business has grown from 20 employees to about 48 employees. The recession in 2009 to 2010 decreased their business size, and they have been reluctant to bring new people on due to the uncertainties in the economy. [#13]
- The non-Hispanic white male representative of a majority-owned specialty contracting firm stated, "In the peak we were 170 people. Right now [we had] 75. At

our lowest we were at 50, and that was like scraping the bottom of the barrel. We were pedaling to stay afloat." [#17]

- A non-Hispanic white male representative of a majority-owned professional services firm reported that there have been many changes to the size of the firm over time. He noted that they started out with a few part-time employees, and that they are now the largest they have ever been at 33 employees. [#20]
- The non-Hispanic white male representative of a majority-owned construction firm noted that they have around 30 employees during the season. They do not operate in the winter. [#35]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm stated that he started out with only himself and grew to eight employees. He said that the recession hit and he downsized, but he is back up to eight employees now. [#32]
- A Subcontinent Asian American male owner of an MBE-certified professional services firm reported that they have been able to sustain 25 employees, which has allowed the firm to perform more work. He stated, "We are increasing the ability to take on more work and size[s] of jobs, of course." [#49]
- A non-Hispanic white male owner of a construction firm reported that the highest number of full-time employees that he has had is nine. He stated, "We contracted about 10 years ago. A lot of that was due to economic concerns and big changes and shake-ups in the ... industry. It made it impossible for us to continue to do what we were doing." [#61]

Some interviewees said that they had reduced permanent staff or frozen hiring because of the economic downturn and poor market conditions. For example:

- The non-Hispanic white female owner of a WBE-certified goods and services firm reported, "We are afraid to hire. The only way we can grow is to hire sales reps. I could double the size of the company in three years if I just hired more people to go out and sell. We're afraid to hire, so we have stopped growing." [#1]
- The non-Hispanic white female owner of a non-certified specialty contracting firm reported that the size of the company has changed significantly. She went on to mention that they had over 20 employees at their peak, and that they now have fewer than 10. [#8]
- The non-Hispanic white male owner of a specialty contracting firm indicated that he used to have seven full-time employees. The business decreased to the four current employees during the economic downturn. [#59]

Capability of businesses to perform different types and sizes of contracts in different parts of the state. Interviewees discussed types, locations, and sizes of contracts that their firms perform.

Many firm owners reported flexibility in the locations where their firms perform work. Relevant comments included:

- A Black American male owner of an MBE-certified specialty contracting firm indicated that the general contracting work that they do has stayed the same. However, he said that the size of work and geographic areas have both increased since they started. He commented that his project size is typically $40,000 to $50,000, and that they have more confidence now to go after jobs in a wider area including going out-of-state. [#22]
- A non-Hispanic white female owner of a WBE-certified professional services firm reported that when they moved to their new location in Central Indiana, they learned that there is a local sales market, and they want to access that market potential. They currently have very little local business, and their goal is to find a way to generate more local business. [#52]
- When asked if there were limits to performing different types and sizes of contracts, the representative of a Hispanic American-owned non-certified specialty contracting firm stated, "Not at all. We do work for [a private client], and we [work with] them from Texas to Minnesota and from Nebraska to North Carolina." He stated that the company will have to bring in additional technicians if the business gets large enough. [#62b]
- The non-Hispanic white female owner of a WBE-certified professional services firm mentioned that she gets business from out-of-state companies with Indiana locations and Indiana companies with locations in other states. She noted that this requires her to keep up with not only Indiana laws but other states as well. [#5]

One interviewee indicated that using heavy equipment can restrict firms to local jobs. The non-Hispanic white female representative of a majority-owned construction firm stated that the firm does not take on jobs too far out from the town they are located in because it is difficult to haul equipment and have the employees travel. It is also hard to travel to other towns to do work because they do not know the vendors or the municipalities in those areas. [#14]

Some firm owners indicated that their companies perform both small and large contracts. [e.g., #1, #16, #35, #54, #60, #65, #66] Comments include:

- The non-Hispanic white female owner of a WBE-certified professional services firm indicated that her firm is capable of taking on any size contract related to the firm's specialty. [#4]
- A non-Hispanic white male veteran owner of a contracting firm noted that size of project is usually not a problem. He reported that they have not received any projects that have been too big. He stated, "If it was a big project, I have two or three other businesses that could partner with me on it. We have been able to handle any job that we have gotten in the State of Indiana." [#10]

- The Hispanic American owner of an MBE-certified construction firm stated, "We do anything from what I call service work, which might be a few hundred dollars, up to our largest project [of] $10 million ... Our niche is in the low $0.1 million to $3 to $5 million." [#13]
- The non-Hispanic white female representative of a majority-owned construction firm reported that the firm prefers to propose on jobs that are between $100,000 and $200,000. She added that they have been contracted on larger jobs, up to $800,000, and that they will also perform small jobs at $1,000. The company will perform the small jobs because the firm knows it helps with possible jobs in the future and relationships. [#14]
- The non-Hispanic white male representative of a majority-owned specialty contracting firm stated, "We do everything from a $1 million remodeling project for a school system to [smaller projects] ... We are on the team for [a public building]. It's a $400 million project. Our piece of it is $50 to $60 million. " He added that they are the general consultant for a large airport and said, "That's a $2 billion project that we're in charge of. So we can do very, very big work."[#17]
- A non-Hispanic white male owner of a construction firm indicated that his firm is capable of doing anything from very small contracts (e.g., a few thousand dollars) to at least $250,000. He added that in the past he would have been able to do closer to $500,000 contracts. [#61]

Some firms reported setting a ceiling on project size, finding their comfort zone, and sticking to it. Examples include:

- A Black American female owner of an MBE- and WBE-certified professional services firm indicated that the business is fairly diverse, and that it allows them the ability to fit into models of various sizes and scopes. However, the business did not grow very fast. There are some projects that they cannot take on because of their limited capacity. In addition, there are projects that do not fit in their business model. She said, "[We are] staying true to the size and projects that we are taking on." [#2]
- A Subcontinent Asian American male owner of an MBE- and SBE-certified construction firm indicated that he generally works with smaller-sized contracts, which tend to be worth around $230,000. He has done some very small residential jobs, but that is not what he markets towards. He stated that the business would have to hire additional contractors or partner with another contracting firm if the job was much larger. He said, "That is typically the norm for us—the $230,000 to $300,000 range." [#12]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm reported that they are limited by the size of contract because they would not be able to fund a project over a certain amount. She stated that, for a large contract, they would need to have the inventory, and they may not be able to finance that because they are a small company. [#36]

- Regarding contract sizes, the non-Hispanic white female owner of a WBE-certified professional services firm indicated that her maximum contract size is about $60,000. [#56]
- The non-Hispanic white male veteran owner of a SDVOSB-certified contracting firm indicated that $2.3 million is about the limit for his company. He further stated, "It depends on the scope of work and what the job is." [#57]
- The non-Hispanic white male owner of a specialty contracting firm indicated that they do not do very large jobs, and that their maximum contract size is approximately $200,000. [#59]

Local effects of the economic downturn. Many interviewees shared comments about the economic downturn.

Most interviewees indicated that market conditions since 2008 have made it difficult to stay in business. [e.g., #13, #24, #25, #29, #30, #54] For example:

- The non-Hispanic white female owner of a WBE-certified goods and services firm stated that the economic downturn has affected many businesses by making them downsize. She said that there have been a lot of mergers and acquisitions. She also indicated that her relationships with customers have changed and said, "I hear a lot of frustration from my customers. They are doing more work. I couldn't tell you how many have downsized, [including] big corporations as well as small ones." [#1]
- A non-Hispanic white male representative of a DBE-, MBE-, SBE- and WBE-certified construction firm owned by a Hispanic American female reported that the size of the firm has fluctuated over the years. 2014 was a difficult year because a lot of jobs did not materialize. The economy was still slow, and the clients were over budget. [#3a]
- The non-Hispanic white female owner of a specialty contracting firm reported that the business had already declined before 2008 and 2009. She noted that 2008 was a particularly bad year for the firm. [#8]
- The non-Hispanic white female owner of a non-certified construction firm stated that there was nothing specific to being a woman-owned business in the economic downturn. She indicated that it affected the whole country. She added that her business was severely affected by the downturn. She said, "It slowed down a lot ... In 2008, we started pulling our trucks off the highways. It didn't make sense to leave them out there. We were losing money." [#24]
- A Hispanic American male owner of a goods and services firm reported that the hardships or challenges during the recent economic downturn were not associated with being a minority-owned business or even a small business. He said that everybody was affected. He stated, "Nobody had any money, and nobody was loaning anybody any money." [#33]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm mentioned that the 2008 to 2009 downturn was tough for his business. He

commented, "The jobs were few and far between. You had to take what you could get, but it also helped to weed out some of the deadbeats. By the time it was done, it had spread out the little work that was done, but we survived." [#32]

- The non-Hispanic white male representative of a majority-owned construction firm commented that the recent economic downturn was tough for his business. He said, "As the housing market goes, so does the business. So, 2009 to 2010 were the toughest years. We survived but certainly didn't thrive in those years." [#35]
- The non-Hispanic white male owner of a trucking company indicated that the economic downturn has directly affected business due to the "loss of contractors and plants." As a result, costs have increased. He stated, "Unemployment and property taxes have insanely increased, and no one can afford anything." [AI#9]
- The Black American male owner of a professional services firm commented that the economic downturn affected minority businesses that he knows and works with, but did not really affect his. He added that the economic downturn affected minorities more than majorities. [#37]
- A Subcontinent Asian American owner of an MBE-certified professional services firm commented that the economic downturn negatively affected his company and resulted in a drop in business of more than 50 percent. [#49]
- The non-Hispanic white male owner of a specialty contracting firm reported, "It was pretty tough. That was right when we started the [second business]...We invested a lot to get started ...We were pretty financially strapped. When the economy crashed, it was pretty tough for a little while there." [#59]
- The non-Hispanic white male owner of a specialty contracting firm stated that the recent downturn in the economy affected his firm "quite a bit." His company dropped in revenue, and each employee had to drop hours in order to keep his or her job. [#60]
- A Black American female owner of an MBE- and WBE-certified professional services firm reported that, in the Midwest, the company worked with many automotive manufacturers prior to the economic downturn, but much of that business ended when the economy started deteriorating. She stated, "I think everyone had struggles, particularly in the Midwest because of manufacturing."
  She reported that the business is picking back up, but it is not yet at the level it was prior to the downturn. [#65]

  When asked if there were additional barriers or difficulties for small businesses or women and minority firms, she stated, "Not to my knowledge. But in my gut ... yes." [#65]
- When asked about the recent economic downturn, the non-Hispanic white male representative of a majority-owned construction firm stated, "It wasn't good." He went on to report that they cut back staff mainly through attrition. His company held out hope that when they had more work and the economy picked up, they would have good people in place. [#66]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm commented that the economic downturn negatively affected her firm. By 2011, her firm only had four employees, but it still "kept the doors open." [#73]
- The non-Hispanic white male owner of professional services firm indicated that the economic downturn caused his business to contract, and that he had to eliminate employees. He stated, "From about the early 1990s to about 2004 or so, the office had up to seven employees. Since then, the decline has continued to taper off so that for the past several years there have been only two full time people—architects and a bookkeeper/secretary." [AI#15]
- The non-Hispanic white male owner of a construction firm indicated that he had to downsize because of the economic downturn. He stated, "Around my area, the lowest bid gets the bids. It's hard to operate and have employees with taxes, insurance, workers comp. and other fees. So I no longer have employees." [AI#24]
- The non-Hispanic white female owner of a WBE-certified professional services firm indicated that her firm lost all the repeat business it had at the beginning of the economic downturn. However, she was able to market her business to new clients. She indicated that 65 percent of her current business is with repeat clients. Between 2008 and 2012, her business had no repeat customers, and all of her work was for new clients. [#4]
- The Black American male owner of an MBE-certified specialty services firm stated that, while his business did not do well in 2009, he got involved with federal stimulus projects that helped his company. He reported that a number of minority-owned businesses have gone out of business in the past few years. [#6]
- A Subcontinent Asian American male owner of an MBE- and SBE-certified construction firm reported that he lost a lot of money in 2009. He said, "When the economy goes, so does the work. [In] 2009, I lost a lot of money as a company. Obviously, it's been a recuperating process ever since. Although, the last couple of years looked pretty decent, and we've been in the profit margin." He went on to say that during those rough years, competition with other contractors was very strong, and he noticed more bid shopping during that time. [#12]
- A Black American female owner of an MBE-certified professional services firm reported that the recent economic downturn hit her business hard. She noted that, as a franchise, they received some financial help from headquarters through the worker's compensation rebate. [#29]
- When asked if there were additional barriers for small businesses in the recent economic downturn, a non-Hispanic white male owner of a construction firm reported, "I think it is all a matter of management practices and what you think you can accomplish. The biggest problem with a small company in a bad economy is cash flow. Our biggest problem has been being able to get our hands on money when we need it." [#61]

  The same interviewee went on to add, "You have your assets that you paid for, hopefully, and those are able to go out and work and make you money, but to have

cash in the bank to back up a job [is more difficult].... For instance, you have a job that is $200,000, [and] you know you are going to need about $100,000 to $150,000 to run that job and get it done before you get paid. So, you have to have cash flow ... It is almost impossible to get a small business loan right now. I don't care who you talk to. I've been to the Small Business Administration (SBA) seminars. They just say it's difficult." [#61]

- The Hispanic American male owner of a specialty contracting firm reported that there are challenges for small businesses during economic downturns. His company did not have as many customers, so it was not as diversified as some larger companies. He said that this can create a problem if one customer slows down. [#62a]
- The representative of a Hispanic American-owned specialty contracting firm stated, "2008 was tough. We were an independent ... company that started with nothing, and it was rough. But, we've been fortunate .... I've been self-employed almost all my life. I know, being self-employed, there are times you struggle to keep the lights on. So, we didn't really get all that discouraged." [#62b]

Many business owners and managers said they have seen much more competition during the economic downturn. They reported that more competitors are going after a smaller number of contracts in specific fields, with substantial downward pressure on prices. Larger firms have been bidding on work that typically went to smaller firms. Those trends affected construction and professional services companies. [e.g., #39, #54] For example:

- A Hispanic American female owner of an MBE- and WBE-certified professional services firm reported that there were additional difficulties for them as a small business during the economic downturn. She said, "The big companies now started coming into the areas where we were. That's when [several large companies] all of a sudden started looking into [our sector]. They were not [in our sector] at all. Now, they started playing in our field because there was no money in the consumer end. We [are] competing with them now." [#7]
- A Subcontinent Asian American male owner of an MBE- and SBE-certified construction firm reported that during the harder economic times, the competition with other construction firms gets fiercer. He encountered much more bid shopping and experienced being locked out of a bid. He stated that, while he cannot verify this was because he was a smaller business or because of his minority status, the "good ol' boy" network was very strong. [#12]
- When asked about challenges as a small business during the downturn, the non-Hispanic white male representative of a majority-owned construction firm indicated that his industry is an easy business to get into, and others can easily start up their own company. He said, "We have a lot of people who worked here who started their own companies. So, that's competition." [#35]
- The non-Hispanic white female owner of a WBE-certified professional services firm commented, "I think it is harder on the smaller businesses, because I can't bid as low as some of the other ones. I have to make a little more profit for a large amount

of money out if the money's going to be out for this long ... A lot of the larger businesses have a lot more spending capital. I don't. So, that makes it harder for me to do the really low bids. A lot of the Cincinnati companies are getting ... an apartment here or something and using that to get an Indiana certification, but they're not really technically here, and that really hurts too." [#56]

- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm stated, "Doing stuff for the county and the federal government, you didn't see the problems like you did in the private sector. The only thing it did do is take a lot of private sector people and have them do state and federal work where there was money in it. So, you had a lot more people you were bidding against." [#57]

A few business owners and managers said that their companies did not see a decline in work during the economic downturn, or that they were experiencing slowdowns in their business that are more recent. [e.g., #5, #10, #15, #23, #26, #28, #36, #69] Examples include the following:

- A Black American female owner of an MBE- and WBE-certified professional services firm indicated that the business started in 2008 during the recession and has experienced manageable and steady growth since then. [#2]
- A Hispanic American female owner of an MBE- and WBE-certified professional services firm noted that, when 2008 hit, everything changed. She said, "Fortunately, we had seen the handwriting on the wall and had started to diversify our business into [other sectors]." She pointed out, "2008 didn't affect us as much. We were on a delayed cycle. While everyone else was crashing, we were just tightening the belt. 2010 affected us much more. She went on to mention that 2009 to 2010 was when they became more interested in state and public work. She commented, "That was when we knew we had to diversify and get into other businesses." [#7]
- A Black American male owner of a DBE- and MBE-certified professional services company indicated that he did not see too many extra challenges during the economic downturn in his industry. He reported that, because he has more experience now, he feels more secure in his business. He said, "Now I feel, even if it does downturn, I have a chance to do something else ..." [#19]
- A non-Hispanic white male representative of a majority-owned professional services firm stated that the recent economic downturn did not affect them much. He said, "It was a little harder to keep our customers." [#20]
- A Black American male owner of an MBE-certified goods and services business noted that he was just starting in 2008, so he does not feel that the economic downturn had an effect on his business. He said that he did not have anything to compare it to. [#27]
- A non-Hispanic white male owner of a goods and services firm pointed out that the recent economic downturn did not negatively affect his business. He commented, "I'm my biggest competition. If I get out there and hustle, I can grow when everybody else is in a downturn." [#31]

Current economic conditions. Many business owners and managers reported that economic conditions had not fully recovered.

Some interviewees said that they have not yet seen an upswing in market conditions, or that the recovery has not been what they had hoped it would be. [e.g., #30, #56, #61, PF#5] For example:

- A Hispanic American female owner of an MBE- and WBE-certified professional services firm reported that she feels things may not have changed much in the current economy except that companies feel they can do more internally. She commented that she does not feel that "people are bullish on the economy." She said, "Companies are sitting on a lot of cash, but aren't spending because they are not sure the economy is going to turn around." [#7]
- When asked about current economic conditions, the non-Hispanic white male representative of a majority-owned specialty contracting firm stated, "They're picking up. It's not quite as good as I'd like it. But it is what it is. The market's still schizophrenic, and the relationship market that we knew so well back in 1990 to about 2007, 2009, evaporated. It wasn't people hiring people because they knew them and knew they were good at it. It is now a price-driven market. It absolutely is bottom feeders control[ling] the marketplace." [#17]
- When asked about current economic conditions, a Black American male owner of a DBE- and MBE-certified professional services company mentioned that things are turning around, and he is making some money and paying the bills. However, he reported that his business was not doing as well as he thought it was. He said that he needs to change how he approaches the business and become more efficient. [#19]
- The representative of a WBE-certified professional services firm owned by a non-Hispanic white female stated that 2015 has been a down year for her and every competitor she has talked to recently. She noted that she did not know why. [#26]
- The non-Hispanic white male owner of a specialty contracting firm commented that the economy is still struggling in the local marketplace. He explained that people will wait as long as possible to get work done. He thinks up to 50 percent of the people employed in the area go out of the area for work each day. [#60]
- When asked about the current economic conditions, a non-Hispanic white male owner of a construction firm reported, "I don't think that the oil industry is looking for much of a boom any [time] soon. Currently, what's happening in our industry, especially on the retail end of things, the side of it you and I see on a daily basis, is that you're going to see a lot of names changing on flags. The bigger 'C-store' operations ... are out there buying anyone they can get their hands on. It may be one of those things where we're going to end up with 20 large players in the United States, and the 'Mom and Pops' will be gone." [#61]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm commented, "I had a very difficult year." [#73]

- A religious leader and social justice work organizer reported that he is concerned that the unemployment rate in his community is nearly 40 percent, and nearly half of the Black American males are unemployed. He added that there are a number of public works contracts that have come through their city where the MBE and WBE requirements were met, but no minorities actually worked on the projects. [PF#2]

Many interviewees commented that they have started to see improved market conditions. [e.g., #4, #10, #29, #31, #36, #39, #40, #59, #62b, #65, #69] Those businesses mostly reported cautious optimism:

- A Black American female owner of an MBE- and WBE-certified professional services firm explained that she had colleagues that started businesses and were performing entrepreneurial work with her during the downturn, but as soon as the economy picked up, they seemed to swiftly return to corporate jobs abandoning their startups in favor of more predictable workplaces and employment options. She further explained, "Now that the economy is shifting, I am getting more opportunities, which is really, really nice." [#2]

  The same business owner also reported that things are picking up steadily in volume and variety of work. She explained, "The business is coming to me, and there are more RFPs available now." [#2]

- The non-Hispanic white female owner of a WBE-certified professional services firm indicated that the current economic conditions have been very good for her business. [#5]

- A Subcontinent Asian American male owner of an MBE- and SBE-certified construction firm stated that business has been improving. He said that last year was better than the previous several years. He said that the current year looks a little slow for the first quarter, but he hopes it will pick up for the latter part of the year. [#12]

- The Hispanic American male owner of an MBE-certified construction firm indicated that the work has picked up, and he is relatively busy. He commented, "There doesn't seem to be a lot of long-term planning going on. [Potential clients are] not looking at projects a year and two years out like they used to. It's more an immediate need situation." [#13]

- A non-Hispanic white male owner of a construction firm reported that the current economic conditions are better. He pointed out that he may double his revenue this year. [#18]

- A Subcontinent Asian American male owner of a professional services firm reported that economic conditions are improving. He said, "I still consider myself blessed. There are still some challenges here and there. My job is not as stable as when I was at [a private firm], but, it's still better than three years ago." [#21]

- A Black American male owner of an MBE-certified specialty contracting firm indicated that the current economic conditions are pretty good for his business. He noted that Indiana is doing a good job of attracting growth and keeping businesses

in the state. He said, "I feel there are opportunities now for guys like me because being smaller allows me to put more time into relationships. It's not only about buildings and infrastructure, but [also] relationships." [#22]

The same interviewee noted that with better economic conditions there are an increased number of both large and small projects. He pointed out that some large contractors will not do small projects, so there is an opportunity for small companies like his to do those projects. [#22]

- The non-Hispanic white female owner of a non-certified construction firm mentioned that the current economic conditions are good. She noted that it did not start improving until 2012. [#24]
- A non-Hispanic white male owner of a goods and services firm reported that the current economic conditions are very good for his business. He commented, "Last year was really good, and growth is there for this year if I can find good employees that are knowledgeable and have the skills we need." [#28]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm mentioned that the current economic conditions are good. He stated that they have pulled out of the municipal market right now because they have enough work. He said that they also were short-staffed for a while and have not made an effort to go back for more government work. [#32]
- A Hispanic American male owner of a goods and services firm pointed out that the current economic conditions are better than they were during the economic downturn. He said, "There are more people spending money now, but overall it is less money." [#33]
- The non-Hispanic white male representative of a majority-owned construction firm reported that the current economic conditions are decent, and his company is doing better than it was during the downturn. He said, "It's a slow climb to get out of it. [We had] two or three bad years in a row. It takes a good five or six years to climb out of it." [#35]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm stated that the economy is picking up. He said, "It seems to be. It seems like there's a lot going on right now [and] a lot of state money out there right now. I do a lot of subcontracting for the guys that get the bigger jobs." [#57]
- The non-Hispanic white male representative of a majority-owned construction firm indicated that business has picked up since the economic downturn, and that it is close to where it was before. However, he said, "I'm anxious about next year. There are not as many opportunities for next year as there were in 2014 to 2015. I follow the workload of the architects, and they are not doing as much right now." [#66]

Business owners' experiences pursuing public and private sector work. Interviewees discussed their experiences with the pursuit of public and private sector work. Most interviewees indicated that their firms conduct both public sector and private sector work. [e.g., #1, #9a, #10, #13, #19, #33, #35, #37, #49, #59, #65, #66] Examples from the in-depth interviews include:

- The Black American male owner of an MBE-certified specialty services firm stated that he does business with both private and public customers, including cities and the state. He has experience working with state agencies, INDOT, and universities in Indiana. He reported that his company wins that work on its own rather than as a part of a team. [#6]
- The non-Hispanic white male representative of a majority-owned goods and services firm reported that his firm does both public and private sector jobs. He stated that public sector jobs are different from private sector bids because there are often not "nearly as many competitors for the same project." He said, "You keep seeing the same things happen time and time again, and you are not sure everyone is getting a fair shake." [#15]

  The same representative also stated that once a vendor "gets themselves in the door" with government jobs, they tend to continue to get government jobs. He explained that having a Government Service Agreement (GSA) does help some vendors. [#15]
- A non-Hispanic white male owner of a construction firm mentioned that a challenge in the private sector is getting on the approved vendor list with the large companies. [#18]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated that there is no difference between public and private clients. She said, "You have to work through both types of projects the same [way]. You have to manage expectations. We're dealing with predicting the future, if you will. We are designing a building that doesn't exist at all. I believe it's the same for both private and public. You have the same process." [#30]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm reported that his business is now 90 percent private sector work and 10 percent public sector work. He pointed out that his business has changed since 2008 when about 50 percent of his jobs were in the public sector for the city. He pointed out that he reviews new government opportunities, but if they do not have a 3 percent veteran set-aside, he does not go after it, because he will not have a chance of getting it. [#32]
- The non-Hispanic white female representative of a trade organization indicated that the members of her organization work in both the public and private sectors. She said, "I think they go where the work is. Any of the members will go where the work is, whether it is private or public." She reported that her members have had more public sector work in the past 12 months, and she credits much of that to the organization's effort to learn more about public projects. [#50]
- A non-Hispanic white male representative of a majority-owned specialty contracting firm explained that about 50 to 60 percent of the work done by the firm is for INDOT; about 10 to 20 percent of the work performed by the firm is for municipalities; and the remaining 20 to 40 percent is commercial, private sector work. [#54]

- The Hispanic American male owner of a specialty contracting firm reported that his company has not done any work with the state yet, although they are trying. The company has done work with the federal government. Most of their business is private sector work. He stated, "With the state, no, we haven't [tried]... I think it is because we've been so busy with [a specialized industry]. We haven't really tried..."[#62a]
- The representative of a Hispanic American-owned specialty non-certified contracting firm stated, "The things we've bid on with the state, we haven't gotten. We're trying to get in with our [product] sales. One of the first questions [asked by] everybody in the state ... is, 'Are you woman-owned or minority-owned?'" [#62b]
- The non-Hispanic white female owner of a MBE- and WBE-certified goods and service firm stated, "I've had a difficult time finding certified businesses to work with to meet with certain guidelines. We are state certified, and it has been difficult getting any part of state work after submitting a proposal. Our portfolio shows we can handle at least a percentage." [AI#26]

A number of business owners reported differences between public and private sector work and how those differences affected their firm's ability to pursue one business sector or the other. Comments included:

- The non-Hispanic white female owner of a WBE-certified goods and services firm reported, "We are a service organization. Our sweet spot in the business world are people who don't have enough help to sit around and figure out what they want to order. People call on us to help .... We can save them man-hours ... the State of Indiana, State agencies are not interested in this. They are interested in the lowest price. Bid it, wait, and then wait to get paid and that's just a hard way to do business. So it is not worth the work, and there is no loyalty, no relationship. We are a relationship company." [#1]
- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female explained that the firm has done private work projects and public work projects, but they have more opportunities for public work projects because of the designation MBE and WBE and other certifications. [#3a]
- The non-Hispanic white female owner of a WBE-certified professional services firm indicated that the main difference between public and private sector work is that public work has more paperwork and takes longer to get paid. She said, "It's just the paperwork. The only thing I could say is that it takes longer to get paid. There is just more red tape with the public work. Remember, I have only been doing the public work for three years, so it is new to me to have all that paperwork." [#4]
- When asked about the different experiences between public and private sector work, a Hispanic American female owner of an MBE- and WBE-certified professional services firm stated, "The private sector generally has more funds and ... values quality. Public values cost." She added, "Here in Indiana, the public wants low cost. And private wants quality and cost. That's what I've seen." [#7]

- The Hispanic American male owner of an MBE-certified construction firm reported that his business works with both public and private sector projects. He further stated, "Public work is all low-bid. So, we are almost forced to [use] the lowest subcontractors, which sometimes affects scheduling and quality of work. Private sector work is based on quality as well as price. We can choose our subcontractors." [#13]
- A Subcontinent Asian American male owner of an MBE- and SBE-certified construction firm reported that his company works on a mix of projects, both public and private. He has fewer problems with the bidding process of public sector work due to the nature of the process. He noted, "Most of the bid peddling happens on private projects. It happens on public projects, too, but I have better luck with the public projects." [#12]
- The non-Hispanic white male owner of a construction firm stated that he does not do any university or public work. He said, "The reason I don't is because it is all political. They don't care a bit about what your capabilities are. If the right people don't have the right connections, you're not going to get the work." [#23]
- The non-Hispanic white female owner of a non-certified construction firm stated that the firm primarily works in the private sector, but she would be interested in public sector work if it was for one of the universities or the State of Indiana. When asked, she noted that the only thing holding her back was getting connected to the right people to talk to. She indicated that she thought the right person to talk with would be the purchaser. [#24]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm reported that his business is now 90 percent private sector and 10 percent public sector work. He pointed out that his business has changed since the recession when about 50 percent of his jobs were in the public sector for the city. [#32]

  When asked about challenges in the private sector, the same business owner indicated that it can be a pay-for-play situation, as people at construction and engineering companies are on the board of local economic development councils. He said, "I don't have $5,000 to $6,000 to put down as a member of the County Economic Development Council and maybe get some job that one of the major companies doesn't want." [#32]

  The same veteran business owner also mentioned that sometimes in the private sector they are seen as being too small to do the work, even though they may have proof from past work that they can do that size of project. He said that the perception of being too small happens in both the private and public sectors. [#32]
- A Hispanic American male owner of a non-certified goods and services firm indicated that they'd love to do more public sector work. He said, "Every time they do new construction, it requires bonding and we don't do bonding. We're not that liquid." [#33]

- The non-Hispanic white male representative of a majority-owned construction firm commented that they get frustrated with public bid work because of all the time involved. He said, "It can get frustrating because of all the guidelines ... You have to have this kind of mulch, this kind of soil, these kind of trees ... And, it's typically the low bid. So, we're not the low bid, but we went through this effort and didn't get the job. We know we can make our rate with what we do for residential customers. So, that's what we focus on." [#35]

  The same representative went on to comment that they do not get many requests for public projects. He noted that his firm would be interested in bidding on and getting projects with the state agencies. He said, "But that's not where we make our money. We don't need to cut our price in half just to get a job we're not going to make any money on. It's a waste of time." [#35]

- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners reported that most of their members work in the private sector. She added, "I am finding some [of our members] have struggled with the process with the public sector. What all they have to go through ... the time, energy, the amount of work they have to do for those opportunities ... when they don't get them ... in some cases it can be a lot of financial time and energy that is spent that could have been spent possibly on a private sector opportunity that would award them with more dollars." [#45]

- When asked how the economic conditions differ between private and public sectors, the non-Hispanic white female representative of a trade organization explained, "I think the private sector is, once you get established or get your foot in the door, I think it is easier to keep that relationship. In the public sector, because of the whole process, it's just finding out about the opportunities. South Bend has done quite a bit in the last few years to make that more of an open process and teaching. They have really reached out." [#50]

- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm reported that there are barriers for small businesses pursuing public work. He said, "Bonding is one issue, but also the financial status. Like with DOT [Department of Transportation] and all those guys, you have to do certified financials, which they've got to see. If you don't have a whole lot of money, you can only do a small job, if any jobs, for them. Yes, the money is the number one thing ... I've seen big companies that have a lot of money go broke, but they don't seem like they go out of their way to help the small guy out much." [#57]

- When asked if it was more difficult for smaller businesses to go after public sector work, the non-Hispanic white male owner of a specialty construction firm responded, "I would say yes. I don't have the manpower ... In the office, I'm basically doing everything myself. It makes it a little tougher than if you have somebody else out looking for the jobs and bidding the jobs ... [For] the private jobs, the people come to you." [#59]

- The representative of a Hispanic American-owned specialty contracting firm stated, "We've been more successful with the federal government than with the state." He

indicated that many people have the impression that chains or big companies do a better job than a small company. He stated, "You get a national chain sign on your truck and you're going to be more qualified than a small company like ours. Every [location] that we do has had a national chain in once or twice, and they say they're never going to have them again." [#62b]

- A Black American female owner of an MBE- and WBE-certified professional services firm stated that there are challenges for small businesses with public sector work. She said, "With the Indiana plan, there's a lot of holes in it. The hole for me is the fact that large businesses come into our state and get the contracts. Once they get the contract, the subcontractors that they put on the contract they want to bait and switch. They want to bring in their cronies or their friends that they cut a deal with, with lower prices, and find a way to get the subcontractors that they got the job with off the job ... I've had some women tell me that they don't even get called. They're working the job, and they never get the call to say they got the job." [#65]

Some interviewees reported that they preferred private sector work over public sector work. Some of the comments indicated that performing private sector contracts was easier, more profitable, and more straightforward than performing public sector contracts. For example:

- A non-Hispanic white male owner of a goods and services firm reported that he does not have any public sector business, not even the university in town. He said, "The universities, they don't buy anything. They used to in the '80s and '90s, but not anymore. We used to have 50 to 60 percent of their business." Then, he noted that the university went with a big company from a different state that promised big savings on their supplies. The university started using a large, national company, for its purchases, and he said he couldn't be competitive on price with them. [#25]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm commented that timely payment is better in the private sector. He said, "The only thing is that I get paid quicker in the private area. The public stuff takes forever to get paid. Right now, we are waiting to get paid by the City of Indianapolis for stuff we did back in January as a sub. The City sits on the invoice for 90 days and then the prime sits on it for 30 days, and then we finally get paid." [#32]

  The same veteran owner also mentioned that, with all the hurdles they have to go through to do public work, it's not worth it. He said, "We can get the same amount of money working with a couple of farmers, and we don't have to jump through all the hoops. So, we don't even bother now with the City ... or the state. They make it tough to do business with them unless you're a woman or a minority. And, as a veteran, I would think that would count for something, but apparently, not." [#32]
- This non-Hispanic white male veteran owner of a VBE-certified professional services firm went on to point out that there are many public projects in the county that go out no bid and that can be a problem. He noted that only certain companies are included in the no bid offerings and, as a small business, he is not able to donate

to the local government officials or departments. Therefore, his company is not included. [#32]

- The non-Hispanic white male representative of a majority-owned construction firm mentioned that around 90 percent of their work is private sector work. He noted that they like the private sector work versus the public sector work because it is not low-bid focused, there are only one or two other competitors, they can get a higher rate, and they get paid more quickly. [#35]
- A Black American male owner of a specialty contracting firm stated that the company should be ready to take on the work when it agrees to take on work. He said, "Right now, I haven't launched out into that [public] sector yet because I want to build my capital and equipment." He knows that public sector work would include a lot of outdoor work that will require heavy equipment. [#40]
- The non-Hispanic white female owner of a WBE-certified professional services firm reported that when she is on public bids it can take months to get paid as a subcontractor because others get paid before her firm. She said, "When we did the [a specific job], we were a third tier down. And being a small business, that was painful. We had to wait for two other people to get paid. So we'd be lucky to get a check in 90 days, which almost never happens. And that was a two-year project for us." [#4]
- A Black American male owner of an MBE-certified specialty contracting firm stated that he would do anything, public or private, that made sense. He said, "I'm not doing public because I don't like to do public. It's just that there have been better opportunities for me in the private area. If there is a public bid on a project that I could do, I would do it." [#22]

  The same interviewee noted that he has learned there is more scrutiny in public jobs regarding costs. He pointed out that a key factor to him and his company is integrity and the quality of work. He said, "A lot of time, public is not about quality, it's about price .... Where in private, it's, 'I want it done, but I want it done correctly.' I'm not going back and redoing it or using cheap materials." [#22]

Some interviewees said that pursuing public sector work is challenging because of lack of communication or because their firms were new. Interviewee comments include:

- A non-Hispanic white male representative of a majority-owned professional services firm reported that they do public work for schools and the City of Evansville and are looking to do more public work. He commented that it can be tough with a public sector bid when you have a question you need answered. He indicated that he calls down to the agency but gets passed around with no one answering his questions. He said, "It would be good to have more people rather than computers and voicemail." [#20]

  The same interviewee also reported that with residential work there is no problem with communication because you are talking directly with the customer. He noted that with the very large companies, you have similar problems as with public agencies because of a lot of paperwork. He said that can be frustrating. [#20]

- A Black American female owner of an MBE-certified professional services firm reported that she had bid on a public sector job as a minority-owned business, but she needed to have a bond. She reported that the bond was the same size as the contract. She stated, "I had to get a bond for $175,000, and I would've had to put up two houses plus give up this money for the bond. I had won the bid, but had to get this bond." She noted that because of the bond requirement and the risk against her houses, she rejected the job. [#29]
- A Black American male owner of a DBE- and MBE-certified professional services company stated that a challenge he faced in the public sector was that many businesses were already in the public sector, and he was brand new. He said, "There were certain companies that they knew. There might be favoritism in both the public and commercial markets."[#19]

Some interviewees identified difficulties obtaining private sector work. Examples include the following:

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female stated that a disadvantage to being a small company in the private sector is that companies do not care who you are "as long as your price fits their budget." Many small companies don't have the dollars to be at the front of larger projects and negotiate large projects. [#3a]
- When asked if they had experienced any problems or barriers in the private sector as a minority-owned business, a Subcontinent Asian American female owner of an MBE-certified goods and services firm reported, "Yes, a little. My speech is different. My accent is definitely different. The first time they talk with us, it bothers them a little. But when we give them a good product at a good price, they come back to us." [#36]
- A non-Hispanic white female representative of a majority-owned specialty contracting firm stated, "The nice thing about the public work is that it goes out for bid. So it's apparent when it's going to happen. At least I feel like we have a fairly decent shot at getting the work as compared to everybody else in the area. In the private sector, I firmly believe that work is generated more on relationships that have been developed in the past ... Some of the private customers that we've worked for over the past 20 years we're still working for. I don't know that we would necessarily get that work [otherwise], or even have an opportunity, because a lot of times you just don't know what's happening ... it doesn't go out for any kind of bid." [#44]

C. Keys to Business Success

The study team asked firm owners and managers about barriers to doing business and about keys to business success. Topics that interviewers discussed with business owners and managers included:

- Relationship-building *(page 33);*

- Employees *(page 38);*
- Equipment and materials *(page 41);*
- Pricing, credit, and relationships with suppliers and manufacturers *(page 43);*
- Financing *(page 44);*
- Bonding *(page 48);*
- Insurance *(page 51);*
- Timely payment *(page 53);*
- Licensing and permits *(page 55);* and
- Other keys to success *(page 55).*

Relationship-building. Across industries, most business owners and representatives identified relationship-building as a key component to success. [e.g., #9b, #18, #21, #23, #25, #26, #28, #29, #32, #37, #40, #44, #47, #48, #49, #53, #55, #57, #60, #63a, #65, #71a, #75] Examples of comments include:

- A Black American female owner of an MBE- and WBE-certified professional services firm said, "Relationships with customers is huge. Of course relationships with customers are essential. I find that the more honest I am with my clients, the stronger my work has become ... I am able to be more candid with them and develop stronger relationships with them. I am extension of them. I am a part of their team, and they are helpful to me with my business." [#2]
- The non-Hispanic white female owner of a WBE-certified professional services firm pointed out that networking is important, and all the networking she has done over the years has created good relationships with many key individuals. These individuals provide referrals for her for new business. [#5]
- A Hispanic American female owner of an MBE- and WBE-certified professional services firm indicated that relationships are important. She indicated that it is also important to find out who the key decision makers are. Then she said, "It's important to build a relationship with them, and make sure they understand your business, what you offer, and what can help their company or organization." [#7]

  The same business owner said she worked to build a relationship with one private company for five years before getting the contract. [#7]
- The non-Hispanic white female owner of a specialty contracting firm mentioned that reputation is very important. She said, "I have people that call no one else and they'll tell me, 'I've never called anyone else. What can you do for me here? Let's get this job done.' And you try to really bust your butt to do that for them." [#8]
- A Subcontinent Asian American male representative of a professional services firm owned by a Subcontinent Asian American female indicated that you have to know someone at the state agencies to make any progress. He commented, "If you know somebody at the state agencies, you will get picked right away. If you don't know

anybody, then you won't get picked as a prime vendor or to get that certification." [#9b]

- A non-Hispanic white male veteran owner of a construction firm reported that his business is built on relationships. He said, "The best type of advertising you can have is word-of-mouth. The people in the field that you work for telling somebody else, 'This guy did a great job.' That's what I tell our people. I tell them that the key to our success is showing up on time, doing a good job, and cleaning up the mess after the fact. When we do that, we're eliminating a big headache for our client." [#10]

- A Subcontinent Asian American male owner of an MBE- and SBE-certified construction firm reported that he has great relationships with some general contractors, and not as good with others. He has a great relationship with the ones that are fair and honest to him. For his own customers, he must do a good job and be fair. He commented that he because of his good relationships with some customers, he gets work that he does not advertise for. He stated, "Everybody I have done work for has either called us back or referred us." [#12]

- When asked about relationships with customers and others, the non-Hispanic white female representative of a majority-owned construction firm stated the firm does not subscribe to the bid services. They have enough relationships that they get invited to bid on plenty of jobs for both private and public sector work. Those invitations are how this firm finds out about jobs. She explained that she sometimes gets invitations from firms she has not heard from. She receives so many invitations that she cannot bid on all of them. [#14]

  The same representative added that success in this industry is based on reputation, and that this can also be a barrier to getting work. The firm must have good relationships and know "the right people," or they will not get asked to bid on jobs. She expanded by saying, "A lot of it does come down to networking, even on the public [work]." [#14]

- Regarding relationships with customers and others, the non-Hispanic white male representative of a majority-owned goods and services firm noted that taking care of the customer and taking care of any issues the customer might have will yield a loyal customer. He explained, "If [you] don't come through for a customer a couple of times in a row, you are not likely going to get that call the third time." [#15]

- A Black American male owner of a non-certified specialty services firm reported that maintaining relationships is important for getting public sector jobs. He added that there are more jobs to get from the state as a DBE, but, until he can get that certification, he does not know what kinds of jobs he could get. [#16]

- A Black American male owner of a DBE- and MBE-certified professional services company stated, "Success is who you are, what you are about, [and] what you believe in. What matters is your attitude about work. If you don't like what you're doing, it's going to show in your work." [#19]

- A Black American male construction management firm owner mentioned that most business relationships are built from trust. He said, "Can they trust you to get the job done, for one. Can you meet deadlines and also keep them in the loop as to what's happening." [#22]
- The non-Hispanic white female owner of a construction firm stated that a key to business success has been customer service. She commented, "If you say you are going to be there at ten o'clock, that doesn't mean five after. That means ten o'clock." She added that they have retained clients from when they started. She said, "For some of our clients, they think of us as a friend and as a business partner." [#24]
- The non-Hispanic white female owner of a WBE-certified professional services firm reported that relationships are very important. She stated that they have very good relationships with their clients. She said, "When we get with our clients, we really try to dedicate ourselves to them and establish those relationships." However, she did say that some relationships are hard to achieve because of the established relationships some people already have with each other from years of doing business together. [#30]
- A non-Hispanic white male owner of a goods and services firm indicated that a major key to his success is his personality and building relationships. He said, "I go in every two weeks. I shoot the bull with them, establish a relationship. I believe that no matter what kind of sales you are in, you have to sell yourself first. That's how I've been successful." [#31]
- A Hispanic American male owner of a goods and services firm indicated that the key to business success is being honest with your customer. He said, "Honesty. Integrity. I have very loyal customers. We're family-owned and operated, and all my employees have the ability to speak for the company. If the customer says, 'I want to talk with the owner.' I'm available. I'll talk with them." [#33]
- The non-Hispanic white male representative of a majority-owned construction firm reported that customer relationships are an important key to success. He said, "You know, good news travels fast, but bad news travels faster ... If you do a good job, they'll tell two or three people. If you do a bad job they'll tell 20 people." [#35]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm noted that customer relationships are important and most of their business is coming from repeat customers. She commented, "We have grown because of word-of-mouth." [#36]
- A Hispanic American male owner of a professional services firm reported that a key to his business's success is establishing and maintaining good working relationships with customers and the community. He added, "I still have accounts that I had when I started [the business] nearly 20 years ago." [#43]
- The non-Hispanic white female representative of a trade organization reported that her members have good relationships with their customers. She said, "I think the

majority of ours are repeat customers. We get those new opportunities, but ... building those relationships for repeat customers [is important]." [#50]

- When asked about the keys to business success, the Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm stated that relationships are the most important thing. She explained that relationships are very important, and the need to build relationships with people cannot be overemphasized because "it opens the doors to [business] opportunities." [#51]
- A non-Hispanic white female owner of a WBE-certified professional services firm commented that the keys to success are "integrity [and] listening. You need to hear what people [are] saying ... read between the lines of what they are not saying as well ... and how they view you versus the competition." [#52]
- When asked about the keys to success in the industry, a non-Hispanic white male representative of a majority-owned specialty contracting firm reported that the most important key is "first and foremost, relationships and reputation." He stated, "At the end of this day, this is a relationship business." He added that his firm develops relationships with others before agreeing to partner with them. [#54]
- A Hispanic American female owner of a professional services firm commented that the keys to success in her industry are "opening yourself to opportunities and making certain that you do some networking." [#64]

  The same business owner went on to add that most of her work comes as a result of networking. Her opportunities often come from those she had worked with previously. [#64]
- A Black American owner of a professional services firm stated that relationships with customers and others are important, and that they have "knowledgeable customers." [#67]
- The non-Hispanic white female owner of a professional services firm stated that relationships with customers are what help to get her work. She added that "a lot of networking" is important in her business. She explained that she has joined a networking organization that helps her obtain work. [#68]
- A Black American male representative of an MBE-certified goods and services firm reported that providing great customer service is the biggest key to his company's success. He added that the business is very competitive. He said that customers choose the company based on their ability to provide customer service. [#69]
- A non-Hispanic white male representative of a majority-owned professional services firm stated that relationships are important to the firm's success. He went on to say that a few of the jobs on which his company is currently working began as conversations a couple of years ago. He added that if you "win business," you have to take care of that customer forever. That leads to repeat customers. [#72]
- The non-Hispanic white female representative of a majority-owned professional services firm commented that "voice-to-voice communication with people as opposed to emails or text messages" is a key to the firm's success. [#70]

- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners reported that their most successful members are good at networking. [#45]

Some businesses reported success, building relationships through quality work, customer service, and gaining repeat business. Many emphasized work quality as a key factor. For example: [#1, #16, #25, #42, #51, #55, #61, #72, PF#12]

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female explained that the ability to call others in the industry to get work is due to relationships they were able to gain by doing good work. It took time to build those relationships, but they have established themselves both in the industry and in the community. [#3a]
- When asked about relationships with customers and others, the Hispanic American owner of an MBE-certified contracting firm reported, "I'd say about 80 percent of our business is through repeat business and direct referrals from clients." [#13]
- The non-Hispanic white male representative of a majority-owned specialty contracting firm stated that the main keys to success for his firm are doing things they are really good at, and staying away from things that they don't know how to do. He further stated, "We are really focused on what we do, and we're pretty good at it. It used to be we'd get calls and we'd get projects because people knew we were good and reliable, but it's just not there anymore."[#17]
- A Subcontinent Asian American male owner of a professional services firm commented that he gets a lot of repeat business which is why building relationships with his customers is so important. [#21]
- When asked what may make them different from other companies, a Subcontinent Asian American female owner of an MBE-certified goods and services firm noted their customer service. She said, "We are here until almost 7:30 pm and try to give a good product on time." [#36]
- When asked about keys to business success, a Hispanic American male owner of a specialty contracting firm responded that it was the quality of their work and that they are responsive 24 hours a day. He said, "We do 24-hour emergency maintenance and repair ... If we fell short somewhere ... anytime something went wrong, someone was without service .... It's hard to be perfect, but in this industry you have to be." [#41]
- A non-Hispanic white female representative of a majority-owned specialty construction firm expressed the importance of quality work to the firm. She stated, "I think it's one of our strong points that we do a very professional job ... I think our reputation, so to speak, is one of the most important things." [#44]
- A non-Hispanic white male owner of a construction firm reported that the key to his firm's success is exceeding customers' expectations. He noted that this is especially important for public customers, because they cannot afford to have their equipment down for prolonged periods. [#61]

- A non-Hispanic white female co-owner of an MBE-certified specialty contracting firm commented that her firm's success comes from being the "go-to" firm in her industry. [#63a]
- The non-Hispanic white male representative of a majority-owned construction firm stated that the general keys to success in his industry are quality and performance. He also commented that the relationships developed with customers are very important. He stated, "This business is 99.9 percent relationship-driven." [#66]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated that a key to her firm's success is the quality of the work that they produce. [#73]
- A Subcontinent Asian American owner of a DBE- and MBE-certified professional services and construction firm stated that the keys to success are hard work, industry contacts, networking, and certifications. [#74]

Employees. Business owners and managers shared many comments about the importance of employees and barriers they faced related to hiring and hiring protocols.

Many interviewees indicated that high-quality workers are a key to business success. For some, hiring good employees is a struggle. [e.g., #1, #2, #5, #10, #11, #14, #16, #17, #19, #21, #23, #24, #32, #35, #36, #41, #46, #51, #52, #53, #54, #55, #56, #58, #60, #63a, #65, #67, #72, #73, #74] Interviewee comments include:

- When asked about keys to business success, the non-Hispanic white female owner of a WBE-certified goods and services firm indicated that her business has great employees who care about the customers and work hard to make things work well. Most of the employees have been with the company a long time. [#1]
- The white representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female stated, "If [the firm owner] was here, she would say that the greatest asset we have is our employees." His Hispanic American colleague further explained that when the firm completes an RFQ, the employees' experience is what allows the firm to get the job or not get the job, and that reputation is gained by the employees. [#3a & 3b]
- The Black American male owner of an MBE-certified specialty services firm reported that, in any business, getting the best people is key. He said, "I reinvest in people, plant, equipment, and systems, in that order." He stated that he always tries to get the best people and does this through paying well and providing good benefits. [#6]
- The non-Hispanic white female owner of a specialty contracting firm stated that good employees are hard to find. She added that it is difficult to find a decent laborer, much less an equipment operator. She said, "Find me somebody with a driver's license, even just a regular license much less a commercial driver's license. Find me someone with a driver's license that is sober and drug-free." [#8]

- The Hispanic American owner of an MBE-certified construction firm stated, "We don't have a problem retaining employees. Most of our people have been around for 10 or 15 years. Finding qualified employees is getting more difficult. A lot of them don't have the need to work." [#13]

- A non-Hispanic white male owner of a construction firm noted that employees could be the largest key to success in his business. He stated that it is important that his workers be productive, quality workers. He said, "The quality of the workers has been a problem. Over the thirty years I've been in this business, there are probably a total of two people that I would work with side-by-side now that I have my own business, and that is pretty sad." [#18]

- A non-Hispanic white male representative of a goods and services firm commented that his firm uses an employment agency to find new workers. He said, "Right now it is so hard to find anybody. So we have hired a separate organization to find us people ... We like that we can work with them for six months and get to know that they are good people, we like them, and they work well with everybody before we hire them." [#20]

- A non-Hispanic white male owner of a goods and services firm stated that the key to success in their industry is hiring good people, but he noted that it is tough to find good people. He said, "The work ethic for younger kids today is not like it used to be." [#28]

  The same business owner pointed out that the biggest challenge they have is that young kids need courses in school that are related to real life experiences and life expectations. He gave an example of a kid who showed up for an interview wearing shorts and flip-flops. He said, "He obviously gave no thought to what kind of job he was interviewing for." [#28]

- A Black American female owner of an MBE-certified professional services firm commented that people do not want to work anymore. She said, "Friday, I was looking for two people to work. I called 20 people and got so many different excuses. The economy is better, and most of the good people are working. So, what I'm pulling from are the people that don't want to really do anything. We're pulling the cruddy people right now." [#29]

- A non-Hispanic white male owner of a goods and services firm reported that a challenge as a small business is finding good, honest employees for his business. [#31]

- A Black American male owner of a specialty contracting firm stated that he might spend a little more on a well-trained subcontractor or employee, but he will know the quality is there. He will save money on the backend because he will not have to fix things that were not done properly in the first place. [#40]

- The non-Hispanic white female representative of a trade organization stated that having the right employees is very important. She noted that one big challenge is training. She reported that the members need to learn more about where to get employees, how to retain them, and how to train them. [#50]

- Regarding employees, the non-Hispanic white male owner of a specialty contracting firm reported, "The ones I [have] right now are [very] good. It's hard to find good employees. The last time we hired somebody, we probably went through six people before we found one that was good ... just show up for work. One guy came and worked five hours, and that's all he worked. It's tough finding somebody. The younger generation [doesn't] want to work." [#59]
- When asked about relationships with employees, the non-Hispanic white male representative of a majority-owned construction firm commented that a business needs to be fair with its employees. He added, "We have a good core group that has been with us for over 20 years." [#66]
- The non-Hispanic white female representative of a majority-owned professional services firm commented that the size of her firm can prevent them from hiring more people. She added that they have remedied this by hiring two people to help on a contract basis. She went on to state that "a large firm may be more profitable," and commented that this is largely due to bigger firms having more staff to perform more work. [#70]
- A Native American male owner of a construction firm stated that he has tried to do things that would help recruit good employees, such as the Helmets to Hardhats program for former military. However, he said that being wage competitive is difficult. He explained that he competes for laborers with EBT, food stamps, and other public assistance programs. [#71a]
- The white representative of an Indiana small business development center reported that retaining employees can be a challenge for businesses. He stated, "You know, we always talk about keeping Indiana's talent here. That is something that is a real problem for small businesses sometimes, and [another problem is] the skill gap. They have open positions, but people don't have the education or aren't qualified to fill those positions." [#47]
- The non-Hispanic white male representative of a majority-owned construction firm reported that the company for which he works is a "union shop," and that this has caused them some additional difficulty lately. He stated, "The unions are cleaned out lately on their rosters. Prior to the recession, there were 2.5 million tradespeople nationwide. The construction industry lost 1.2 million jobs, so 900,000 tradespeople found other things to do." He went on to say that he believes this situation will correct itself as the demand picks up, though it will take some time. [#66]
- The non-Hispanic white male owner of a construction firm indicated that it is challenging to find good employees. He stated, "[The] employee candidate pool is almost obsolete. Finding qualified candidates [who are] willing to serve in an apprenticeship has been difficult ." [AI#4]
- The non-Hispanic white male owner of a construction firm indicated that it was difficult to find female employees. He stated that some public agencies require women to work on projects, but the construction industry does not have a large supply of available, qualified women. [AI#13]

Equipment and materials. Business owners and managers discussed equipment and materials needs.

A number of businesses reported the importance of having the right equipment and materials for operating their businesses and keeping it operational. [e.g., #10, #31, #51, #53, #55, #60, #68, #71a] Examples of interviewee comments include:

- When asked about how important equipment is in this industry, a Black American owner of a specialty services firm said, "You [must] have state-of-the-art equipment to get things going." [#16]
- A non-Hispanic white male representative of a majority-owned professional services firm mentioned that equipment is critical in his business. He stated that they have to pay for it in thirty days. [#20]
- The non-Hispanic white female owner of a non-certified construction firm stated that equipment and how you deal with it and maintain it can be a key, especially because they have so many trucks. [#24]
- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners reported that having the necessary equipment is critical for their members. She commented, "Having what they need in order to produce whatever product they're making is important." [#45]
- The non-Hispanic white female representative of a trade organization commented that only a few of the organization's members need specialized equipment. She noted that having the right equipment is important. She further stated that companies need to have good resources for maintenance and repairs as well. [#50]
- A non-Hispanic white female owner of a WBE-certified professional services firm stated, "In a small business, I think it's really important to have creative problem-solvers on your shop floor because the reality is ... sometimes... you need better equipment, but you don't have the resources or capital to get that equipment so you have to figure out how you can push this equipment beyond its capabilities and what other kinds of things can you do to add value to it .... You have to be innovative in using the equipment that you have ... and be able to see beyond the limits of what's there .... We don't know [how far the equipment will go] unless we push it." [#52]
- A non-Hispanic white male representative of a majority-owned specialty contracting firm stated that equipment is important to his firm. He added that the firm must have reliable equipment since the business is schedule-driven and any delay could delay the whole project, which could affect revenue. [#54]

Some interviewees discussed advantages of owning all their equipment. [e.g., #41, #43, #48] Examples include:

- The non-Hispanic white female representative of a majority-owned construction firm indicated that one challenge or barrier for a small company is capital for

equipment purchases. A firm must be able to purchase equipment because renting equipment will not allow a firm to be competitive with prices. [#14]

- A non-Hispanic white male owner of a contracting firm reported, "I don't buy new equipment. I like to have it paid for when I buy it." [#61]
- The Hispanic American owner of a specialty contracting firm stated that he has tried to stay out of debt while getting equipment, but that has not always happened. He further stated, "We've been able to budget and manage to get the equipment we need. Everything we need on the equipment side is free and clear." [#62a]

Many business owners cited expensive equipment, the cost of repairs, or not having the equipment needed for their operation as barriers. [e.g., #30, #31, #62a] Some indicated that their cash reserves are too low to purchase the equipment outright and that they experience limited access to financing. For example:

- A Black American male owner of a specialty contracting firm explained, "A lot of the smaller equipment I have but, some of the larger stuff, I don't have." He added that he still needs larger equipment. When he has jobs that need the larger equipment, he has to rent it. [#40]
- A Hispanic American male owner of a non-certified professional services firm commented, "Equipment is critical. However, it also is quite costly." He went on to report that most of his equipment is so expensive that he had to purchase it used or refurbished. [#43]
- The non-Hispanic white female owner of a WBE-certified professional services firm commented that she has had some issues with equipment repairs. [#56]
- The representative of a Hispanic American-owned specialty contracting firm stated, "[For] our first set of equipment, we went in debt ... and we had a terrible time making the payments." [#62b]
- Regarding equipment, a Black American female owner of an MBE- and WBE-certified professional services firm said that she had difficulty initially getting the computers needed for her business. She tried to lease computers but ran into difficulty with the leasing company and the financing. Now established, she can get the equipment needed. [#65]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm explained that her primary equipment is computers, and she commented that she has been held back by not spending the money to upgrade their computer systems. It would cost about $5,000 to $8,000 per workstation to make the shift to better technology. [#73]
- The non-Hispanic white male owner of a construction firm stated that he has to spend a lot of money to be in business, and that equipment costs are a big factor. [#75]

Pricing, credit, and relationships with suppliers and manufacturers. Business owners and managers discussed relationships with suppliers and manufacturers. [e.g., #16, #53, #55, #61, #70] Comments from the in-depth interviews include:

- A Black American male owner of a non-certified specialty contracting firm reported that access to pricing and credit is important in his field because he often needs materials to complete a job. He added that sometimes having relationships with suppliers helps with access to credit and pricing. He currently has some good relationships and has a line of credit with a wholesale store. [#40]
- A Hispanic American male owner of a non-certified specialty contracting firm noted that it was important to have credit. He commented, "Right away, I used credit cards and maxed them out within a month." [#41]
- When asked about access to pricing and credit, the non-Hispanic white female representative of a trade organization stated, "Those relationships are very important." [#50]
- When asked about access to pricing and credit regarding materials, the Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm commented that it is key to her business. She went on to explain that they often have to work on a net 90 payment basis, and it is very important to have a solid relationship with suppliers. [#51]
- The representative of a Hispanic American-owned specialty contracting firm stated that credit is an issue for the firm. He commented, "We started with nothing. [It] did kind of destroy our credit with the first equipment we bought." [#62b]
- Regarding access to pricing and credit regarding materials, a Black American owner of a professional services firm expressed that it is "absolutely an issue." He said that they ask themselves, "Do we want to incur the expense?" He said, "Access to capital is critical ... Most of what I am talking about has nothing to do with a color disparity, other than the extent to which you have a level of access." [#67]
- A Native American male owner of a non-certified construction firm stated, "Credit is impossible to get." He explained that he would need a high credit score, and because he is self-employed, he could be considered high-risk. He added, "Unless you have an 800 credit score, it ain't happening." [#71a]

Some businesses reported the importance of having good relationships with suppliers. For supply companies, relationships with manufacturers and distributors are important. For example:

- The non-Hispanic white female owner of a WBE-certified goods and services firm reported that access to good pricing is essential. This business contracts with distributors to get good prices and gets volume discounts, which are passed on to the customer. [#1]
- The Black American male owner of an MBE-certified specialty services firm stated that the one most important key to success as a distributor is to have an authorized

stocking distributor agreement with the key manufacturing companies and brands in your industry. He pointed out that you want reputable brands that are known and trusted. His business' agreements with manufacturing companies allows his business to get distributor discounts and support when going after large contracts. [#6]

The same interviewee went on to point out that some MBE-certified suppliers are "pass-throughs," or MBE fronts for non-MBE businesses owned by his competitors. [#6]

The same interviewee also noted that he got the brands and authorized stocking distributorships when he bought the first company. Then, he noted that he went to other manufacturer brands and added them one at a time. [#6]

- When asked about access to credit for the purchase of materials, a non-Hispanic white female owner of a WBE-certified professional services said, "That's really important ... You can't do anything if you don't have any margin to work with ... It's very important to be able to buy on a competitive level .... We're going up against really big subcontractors ... I can't even buy my [raw materials] for the price these people are selling it to them; so I just walk away ... Is that the economies of scales? Is there way to level that out? Should small business be able to have some? There [should] be a consortium so we can leverage our buying power. Things like that would be helpful." [#52]

Financing. Many interviewees discussed the importance of access to capital. As with other issues, interviewees' perceptions of financing as a barrier depended on their experiences. [e.g., #21, #24, #31, #41, #45, #46, #54, #55, #63a, #70, #74] Examples of interviewee comments include:

- A Hispanic American male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female stated that financing is a major part of success in his firm and industry. He later added that the majority-owned companies have the backing and credit to support large projects and become a prime contractor on large projects. Small firms do not have that kind of backing. [#3b]
- A Hispanic American female owner of an MBE- and WBE-certified professional services firm expressed that financing is very important. She said, "You have to have a good, solid financial foundation. With our clients, we have to do what large companies do, and it's pretty intense. In our business, you have to know what you're stepping into, and what it is going to cost you from an insurance and bonding perspective. You have to know that." [#7]
- Regarding financing, a Black American owner of a non-certified specialty services firm stated that it can be a challenge to establish your company if you do not have "great credit." [#16]
- A Black American male owner of an MBE-certified specialty contracting firm stated that it can be hard to get a commercial loan, but not necessarily because he is a

minority. He stated, "Luckily, my credit has been good. Sometimes they want you to have a co-signer, but I never do that because it doesn't work out."[#22]

The same interviewee mentioned that it would be nice to have financing support. He noted that you can go to the SBA for loans, but often there is too much time and paperwork involved. [#22]

The same specialty contracting firm owner added that he believes some of the problems with getting financing from his bank are because they are a small company and a minority-owned company. He said, "I think the risks may be higher with minorities and small businesses. I don't know. We try not to dwell on it. We just move on. We have a strong mindset to move on. Those setbacks don't bother us." [#22]

- A Black American male owner of an MBE-certified goods and services business pointed out that, in his industry, he needs enough money to get a refrigerated truck in order to be successful. He said, "I could make it if I was to have the financing to purchase my own product instead of leaning on someone and then be able to pay them later. To get a bankroll going, to pay cash for my products, to establish myself. I know in dealing with people, if you can pay for your products upfront, that's a good way to get yourself established." [#27]

- A non-Hispanic white male veteran owner of a VBE-certified professional services firm indicated that financing can be a problem. He explained that he tried to get financing through the SBA, but he said that did not go well because his company is not woman-or minority-owned. He said, "We were in the SBA local offices and they were talking with a woman in San Francisco. The woman in San Francisco asked, 'Are they a woman-owned or black-owned company?' Our lady said, 'No' and the woman in San Francisco said, 'Then why are they wasting their time?' I couldn't believe it. These are federal employees at the SBA, and that is their attitude." [#32]

  The same veteran business owner also commented that, when starting out a new company, you need access to credit. He said, "Because you are just starting out, you don't have a lot of credit. Someone will give you credit, but they are going to charge you 22 percent." He stated that his father, who does engineering work for the firm, was able to co-sign for the initial loan. He said, "Because of that we were able to get the loan. If we didn't have that, I don't know what we would've done." [#32]

- A Subcontinent Asian American female owner of an MBE-certified goods and services firm noted that financing is a key to success. She explained that they hadn't been able to get a loan before because they were so new, but this year they received a loan from the bank. She said, "If we want to go after larger projects, we need to have financing for the inventory." [#36]

- When asked about financing, a Black American male owner of a non-certified specialty contracting firm responded that financing is very important. He said that there are times when a business owner needs to his keep dollars as working capital until the company receives payment at job completion. He added that it makes financing "very important to growing any business." [#40]

- When asked about financing, the non-Hispanic white male representative of an Indiana small business development center reported, "Financing is always an issue, absolutely. Either [small business owners] think there's free money, or they don't know where to go." [#47]

  He added, "I think [the financing situation] has gotten better, but small businesses need to be better prepared when they go and talk to these banks. That's having a sound business plan and having those financial projections in place ... I think the days of going into a bank and saying, 'this is my idea,' and getting funded are over." [#47]

- The Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm stated obtaining financing and having a line of credit is essential to her business. She further explained that some banks specialize in helping serve small businesses. She said that her company's current bank is "the best." [#51]

- When asked about access to pricing, credit, and financing being a barrier, the non-Hispanic white female owner of a WBE-certified professional services firm responded, "Originally, I did [have trouble], because everything was in my husband's social security number. I had a hard time getting a credit card the first year... My kids, who were in high school at the time, were getting applications for credit cards! I couldn't get more than $1,000 credit on a credit card." She went on to comment that she has no problems with credit now. [#56]

- The non-Hispanic white male owner of a specialty contracting firm stated, "Financing got a little tough there when the economy crashed. We had some slow paying, and it puts us in a bind on making the payments and stuff. So our credit score dropped some there. We are trying to bounce back now." [#59]

- When asked about financing, a Black American male owner of a professional services firm stated that lines of credit are very important for continued growth and other business opportunities. However, he noted that a financing decision could result in financial disparity if given a lower rating. [#67]

- The non-Hispanic white male owner of a construction firm stated that they always have difficulties getting credit. He is bidding on a $70,000 job, and they are going to have to get a line of credit for it. He reported that he is not sure whether he can get the credit to do the job. He also reported that financing is "very tough." He explained that he looks for financing for most jobs on a case-by-case basis. He said, "I feel as though I have been locked out of these jobs in a lot of ways because I don't have the credit." [#75]

Many firm owners reported that obtaining financing was important in establishing and growing their businesses (including financing for working capital and for equipment), and surviving poor market conditions. [e.g., #15, #25, #33] Some businesses reported that they initially had difficulty getting financing, but were more successful with growth and more time in business:

- The Hispanic American male chair of an Indiana minority-focused business council reported that financing is very important for small businesses. He added that

smaller businesses or startups need financing for cash flow and building their business, and that even established businesses need financing to expand or buy new equipment. [#46]

- A non-Hispanic white female owner of a WBE-certified professional services firm reported, "It's really important ... Banks want to give me money ... [and] now that we're making money, they want to loan me money ... When I needed money, I couldn't find anyone. They wouldn't even answer my calls." [#52]
- The non-Hispanic white female owner of a WBE-certified goods and services firm reported that finance and credit is not an issue now since the business is 30 years old. [#1]
- A Black American female owner of an MBE- and WBE-certified professional services firm reported that a significant key to success for her firm is access to capital and financing. She received a microloan from the Business Initiative. She said that the microloan was helpful, but she knows of other businesses that cannot get enough to propel them forward. She explained that this is a challenge in the industry. [#2]
- A non-Hispanic white male representative of a majority-owned professional services firm said that financing was a big issue when they started. He said, "But as we've become more successful, we've found a bank that loves us, and we love them." [#20]
- The Black American male owner of an MBE-certified specialty services firm reported that, for him, access to credit is not and has never been a problem. [#6]

  The same interviewee went on to report that capital is a problem for many minority-owned businesses. However, he said that if a minority-owned business is not getting capital, then they have not prepared well. He also mentioned the financing assistance that is available through the SBA and MSDC. [#6]

Some business owners reported that they had used personal resources to finance their business operations. For example:

- A Black American female owner of an MBE- and WBE-certified professional services firm reported that when she started her business, getting financing and credit was difficult. She used her credit cards and leveraged her house to begin. She went on to mention that 15 years ago, she worked with a company with a usury rate of 36 percent on its loans. Now, she can work with banks to get normal financing. [#65]
- A non-Hispanic white male owner of a goods and services firm mentioned that financing has not been a problem as he has good relationships with his bankers. However, he noted that to finance the acquisition of a company a few years ago, he used his wife's life insurance cash value. [#31]

Many interviewees said that obtaining financing was and continues to be a barrier for businesses. Interviewees reported difficulty finding new financing or having recently lost lines of credit that they had secured in the past.

- The non-Hispanic white female owner of a non-certified specialty contracting firm noted that financing is a barrier in her business. She stated that she hoped getting the WBE certification would help her obtain better financing. [#8]
- The non-Hispanic white male owner of a construction firm noted that cash flow can be tough for small companies. He mentioned that he lost his total line of credit for his company, and that made it hard for him. [#23]
- The non-Hispanic white female owner of a non-certified construction firm indicated that insurance can be a problem because the insurance company changes what it wants to base the insurance on. She said, "In a good year, they want to base it on our finances and receivables, and in a down year [they base it] on the individual trucks we have. It goes up and down depending on how good a year we have."[#24]
- The Black American male owner of a non-certified professional services firm stated that while his business does not struggle with financing, one of the greatest barriers for companies he works with is access to capital. [#37]

A few interviewees reported avoiding having to obtain financing. For example:

- A non-Hispanic white male veteran owner of a construction firm noted that credit is very easy to get now, and that can lead to problems for small businesses. [#10]
- A Black American male owner of a DBE- and MBE-certified professional services company mentioned that outside financing has not been a problem because he has not needed it. [#19]
- The Subcontinent Asian American male owner of a goods and services firm stated that he does not use any financing, and that cash is very important for a small business. Similarly, he said, "I don't believe in credit, no need for credit. I don't do credit." [#58]

Bonding. Public agencies in Indiana, including IDOA, INDOT, IAA, Hoosier Lottery, and the seven SEIs, typically require firms working as prime contractors on construction projects to provide bid, payment, and performance bonds. Securing bonding was difficult for some businesses, particularly newer, smaller, and poorly capitalized businesses.

Many interviewees indicated that bonding requirements adversely affected small businesses and their opportunities to bid on public contracts, and that barriers to bonding are linked to capital. For example:

- Regarding his firm's pursuit of public sector jobs, the Hispanic American owner of an MBE-certified construction firm stated, "The only issue that sometimes causes us problems is, depending on the size of the project, your bonding capacity. It's tough to get bonds for the larger projects." [#13]
- The Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm reported that bonding is important, but they have experienced difficulty obtaining bonding. As a result, her company has had fewer opportunities

to bond key projects. She thought they might have help with bonding from their financing provider if they needed it, but it was not clear. [#51]

- A Subcontinent Asian American male owner of a DBE- and MBE-certified professional services and construction firm stated that bonding has been an issue for his firm. He said, "We lost opportunities because of bonding." He also reported that capital lines are always based on receivables and bonding is based on equity. Debt will not cover it. He further explained that he has tried to get consistent work, but was not able to get larger and more sustainable jobs because he could not get bonding. He said that he lost a $9 million contract because of several issues including bonding. The bonding companies have told him that the projects are too large. [#74]
- The non-Hispanic white male owner of a construction firm stated that bonding is another part of getting credit. He said, "That's another issue, because that bond is credit also. I have to secure that. That's money I have to take out of my pocket ... If [the state] had a way [they] could bond themselves and then let small contractors in, they would get better prices." [#75]
- The non-Hispanic white female representative of a majority-owned construction firm stated that this firm has only needed bonding for one job in six years. She explained that the firm went through the bank with the bonding company, but needed a co-signer for the bond. At the time, the firm was only two to three years old and the bank and bonding companies were leery to provide a bond for the size of the job. She added that the owner knew a person with enough money to help with the bond. She reported that the firm does not bid on jobs of a certain size because of bonding requirements. [#14]
- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female said that this firm could not get bonding for five years due to funding challenges. The firm overcame that by finding a bonding company "that likes helping woman and minority firms." The firm paid more for that bond, so the extra cost had to be built into the pricing, which affected their ability to be competitive with the majority-owned firms that have been in the industry for years and did not have to bear that cost. There is more risk and less profit due to the high cost of the bond. That is what gets the firms in the door to get more jobs. [#3a]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm said, "When I lost the other company, I always paid everybody my money. It took me six months instead of 30 days; so I had slow credit. I didn't pay everybody. Whenever you get bonding, that's all part of it too. My cash flow back in [those] days was pretty slim. Now, it's not a problem. As long as you have money in the bank, you can get bonded." [#57]
- The representative of a minority-owned construction firm reported that it is very hard to be a prime contractor due to bonding capacity. He added that if your financial statement does not support a bond for a project, then you are "constantly being dubbed as a subcontractor." He also noted that if you are working as a

subcontractor, you are subject to the prime and payment issues, work issues, and union signatory issues. He said that trade unions allow firms to sign on with them if they can provide a bond. However, if you have provided a bond to one trade group, you are limited to getting another bond with any other trade groups. [PF#4]

- The non-Hispanic white female representative of a majority-owned specialty contracting firm reported that the firm still has issues securing bonds. When the economy started picking up, her firm began acting as a prime contractor on more jobs. She reported a lot of "push-back" from bonding companies due to the firm's lack of capital in the bank. [#44]
- A non-Hispanic white female owner of a WBE- and DBE-certified construction firm reported that the challenges to getting started include bonding. She explained that her company could only bond on jobs according to the worth of the company. She said that can limit available jobs until the company has been built. [#55]

Several interviewees reported that bonding required by Indiana agencies prevented them from moving from bidding, or moving from subcontracting to the role of a prime. Examples include the following:

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female reported that in order to get work as a designated firm, the firm has to have bonding unless work is done under someone else's bond. If the firm is under someone else's bond, that firm cannot be a prime contractor. He explained that this negates the opportunities given to MBE- and WBE-certified firms. [#3a]
- When asked about his experience with bonding, a non-Hispanic white male owner of a construction firm commented that bonding has been required for most of his federal jobs. He indicated that bonding requirements can hinder small businesses' opportunities to bid on public contracts and reported that city and county jobs begin to require bonding when the job reaches around $50,000. [#61]

Other interviewees reported little or no problem obtaining bonds, or that bonding was not required in their industry. [e.g., #2, #8, #10, #11, #12, #16, #18, #19, #20, #23, #58, #59, #62a, #65, #66, #67, #69, #71a, #72, #73] Comments include the following:

- The Black American male owner of an MBE-certified specialty services firm said that bonding is not a problem as he does not need to bond. He is a supplier or distributor, and has never been asked to bond. He said they are generally working off of a purchase order. He observed, however, that bonding is a problem for many other minority-owned firms. [#6]
- The non-Hispanic white male representative of a majority-owned construction firm stated that bonding is not important as they don't need to be bonded for most of their jobs. He mentioned that there have been only a couple jobs in the past several years on which they were required to have bonding. [#35]

Insurance. The study team asked business owners and managers whether insurance requirements and obtaining insurance presented barriers to business success.

Some interviewees identified challenges obtaining insurance when working with hazardous equipment or under other conditions. Comments include the following:

- A Black American female owner of an MBE-certified professional services firm mentioned that she had a problem getting insurance coverage. She noted that she had insurance, but she was dropped from her provider's coverage. She said it took her nine months to find a replacement company due to her business type. [#29]
- The non-Hispanic white male representative of a majority-owned construction firm reported that insurance can be important and can be a problem. He explained that they have always had insurance but have had some problems with workers compensation due to accidents. He said, "Our experience modifier went way up. So we had to pay quite a bit for workman's compensation insurance. We're working that back down ... which is helpful." [#35]
- When asked about the difficulties of obtaining insurance, a non-Hispanic white male owner of a construction firm reported, "There [are] a lot of people that will write General Ledger insurance for general contractors. As long as you don't have anything weird that you do, they're fine. It's when you start saying gasoline and oil [that] they all freak out. So, as soon as you tell them you are a specialty contractor in this field, that's when everything goes south. They'll pick it up for me for maybe a year, maybe two, and then they'll usually drop us. Even though we've had no claims, they'll drop us. I'm assuming it has something to do with the regulations on the insurance side of things, which I don't know about." [#61]
- When asked about the challenges of obtaining insurance, the non-Hispanic white representative of an Indiana small business development center reported, "Most of our regional offices might have contacts that they can send [small business owners] to. [Financing] is really more of a local issue, and really it just depends on the business as well. If you are a rocket fuel company, it will be a lot harder than if you are a baker." [#47]

Many interviewees said that they could obtain insurance, but that the cost of obtaining it, especially for small businesses, was a barrier to sustaining their businesses or bidding certain projects. [e.g., #23, #30, #41] Comments include:

- A Hispanic American female owner of an MBE- and WBE-certified professional services firm pointed out that insurance is an issue. They have to have a minimum amount just to do business with the state. She said insurance can be an issue as it's quite costly. She stated, "To get started, it's expensive. I'm not going to lie. For a small business, it's expensive." [#7]
- The non-Hispanic white female owner of a specialty contracting firm expressed that insurance could be a barrier due to the cost, but it is mainly a big hassle due to all the different insurance coverage she needs to get for her business. When asked

about cost of insurance, she said, "One of the problems is they have a pretty high minimum. They want you to pay a certain amount, no matter how big you are." [#8]

The same interviewee also noted that having to get insurance for all the different equipment is a problem. She has to have different insurance and liability for each type of equipment. She said, "I've got so many different kinds of insurance. It's when you add them all together that it's painful just to cover all of them." [#8]

- A Subcontinent Asian American male owner of an MBE-certified professional services firm indicated that the cost of insurance has been a hurdle for his firm. He stated, "We have to carry pretty high insurance. It is called 'errors and omissions' insurance." [#49]
- When asked about insurance, the Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm expressed that it is a challenge for her business. She explained they have all the required insurances, but commented that the bigger the opportunity, the more coverage is necessary. She said they try to keep costs contained, but noted that they have understood risk points in their industry. [#51]
- When discussing insurance as a key to business success, a non-Hispanic white female owner of a WBE- and DBE-certified construction firm reported, "We pay a lot for it, but we have to have it. It is an important factor." [#55]
- The non-Hispanic white male owner of a plumbing company indicated that his ability to compete with larger companies is constrained by "expensive insurance requirements." [AI#11]

Some reported that although they carried insurance, they did not have the level of insurance required to conduct work on a public agency project, or did not have access to the required coverage. For example:

- The non-Hispanic white female owner of a WBE-certified professional services firm noted that insurance requirements vary between public agencies. She said that all of their current insurance covers the requirements for most public agencies, but not all. [#30]
- A non-Hispanic white male owner of a goods and services firm pointed out that insurance is usually not a problem. However, he noted that some companies ask him for insurance, such as workman's compensation, that he cannot get. He said, "I have no employees, so I can't get it." [#31]

One interviewee reported concerns surrounding small businesses' ability to secure health insurance for employees. The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners stated, "There are a lot of concerns about health insurance, especially for the small businesses, about the cost ... That is one strong area of concern. How are they going to be able to keep employees covered and keep their employees?" [#45]

Many interviewees reported that insurance requirements or obtaining insurance were not barriers. [e.g., #1, #11, #12, #16, #17, #20, #21, #43, #53, #57, #58, #62a, #65, #66, #67, #69, #72, #73, #74, #75] For example:

- The Black American male owner of an MBE-certified specialty services firm stated that he had no problems with insurance requirements, and that he can always meet any requirements. [#6]
- The non-Hispanic white male representative of a majority-owned construction firm pointed out that occasionally a project will require them to get higher insurance liability coverage than they normally have. He noted that they get riders for that, and it has not been a problem. [#35]

Timely payment. Full and timely payment by customers or prime contractors is critical to business success. Non-payment and slow payment by the customer or prime contractor was reported by some as a barrier in both public and private sector work. It can also exacerbate issues for small businesses related to access to capital.

A few business owners and managers said that their assurance of payment was better for public sector contracts than private sector work. Some had favorable comments about Indiana agencies. For example, a non-Hispanic white male veteran owner of a VBE-certified professional services firm mentioned that timely payment was better with the state. He said, "With the state, it's a lot nicer. At the end of the month, I send in what I've done to the prime. They send it to the state and send me the check and the lien waiver. We get paid pretty timely. We're out money there only 60 days ... Sometimes, since the 3 percent is a small amount, the primes may pay us before they get paid by the state." [#32]

Some interviewees said that slow payment by the customer is an issue. Examples of such comments include the following:

- The non-Hispanic white female owner of a WBE-certified goods and services firm indicated that the slow payment causes problems for small businesses. [#1]
- A Black American female owner of an MBE- and WBE-certified professional services firm stated that it can be hard to get paid. Payments have to pass through a prime and can be delayed. She said, "It was very scary. The organization should understand the billing cycle of the vendor." She explained that getting everyone on the same page on how the cycle works would help and commented, "You don't want to say anything because you want to be paid." [#2]
- The non-Hispanic white male owner of a construction firm indicated that in keeping your cash flow current, you have to be tough with your customers. He said, "You have to send your invoices out early because if somebody gets a bill that you did the work 30 days ago, they're not wild about paying you. They think if you don't need the money, they're not going to spend the money. So, I always try to get my bill to somebody one-to-two days after I finish the work. And I will chase people to the end of the earth, even for $20. If you don't bill quickly, and you don't chase your receivables, you could be in trouble." [#23]

- The Black American male owner of an MBE-certified specialty services firm stated that minority- and woman-owned businesses need help with timely payment. He said that he believes that lack of timely payment is the major factor in minority- and woman-owned businesses going out of business. He noted that if those companies could have collected their receivables, they may still be in business. In addition, he said that some of the businesses had a lot of work on the books, but they might not have finished the work to get the next progress payment. [#6]

- The non-Hispanic white male representative of a majority-owned construction firm commented that his service is always the last thing to do on a project. He stated that because of that, they are on a short deadline. [#35]

  The same interviewee also indicated that their normal payment method is 50 percent up front and the remaining 50 percent after the completion of the job. He noted that when you work for a large corporation on a job, the company does not pay them upfront. He noted that it is hard for a small company to pay for their employees, supplies, and equipment and then wait 45 days for payment. [#35]

Many interviewees said that slow payment by the prime contractor is an issue and can be damaging to companies in the public contracting industry. Interviewees reported that payment issues may have a greater effect on small or poorly-capitalized businesses. Examples of such comments include the following:

- The Black American male owner of an MBE-certified construction supply company reported that a lack of timely payment and difficulty collecting receivables are barriers for minority- and woman-owned businesses. He said that part of the problem is that those types of businesses are "down the food chain. They are sometimes the third or fourth tier." So, primes get paid, but do not pay their subcontractors in a timely fashion. He also indicated that one of his biggest challenges is collecting his money. He said that he will put a lien on someone, even if it means not doing business with them in the future. He said he will also go to owners to let them know he is not getting paid. [#6]

  The same interviewee pointed out that a local utility provider has a good policy on subcontractor payment. He said their policy is that the prime contractors have to pay the subcontractors within two weeks of the prime being paid by them. This applies to all subcontractors, including minority- and woman-owned businesses. He mentioned that if the prime does not pay on time, the subcontractors can complain the utility. The utility then lets the prime know and tells the prime that they may not be allowed to bid on future business if they do not pay their subcontractors on time. [#6]

  The same interviewee indicated that prime contractors sometimes will not contact with subcontractors after they have been paid. He said that the primes will hold up payment saying they are waiting for insurance forms or other paperwork, or they will say that the invoice was not put in the right document or format. Then, he said the primes will hold up sending out the check due to their check processing schedules. The same interviewee went on to state that owners need to be more

aggressive on making sure that subcontractors get paid, regardless of whether they are minority- or woman-owned. [#6]

- The non-Hispanic white male representative of a majority-owned construction firm pointed out that it is sometimes a challenge to collect money from larger prime contractors. He said, "If you have a large company that is holding back payment because of some small details, that is harmful to a small company." [#35]
- The non-Hispanic white male owner of a construction firm indicated that delayed payments are a cash flow problem. He stated that "Some contractors do not pay for months and hold retainage for a year." [AI#30]
- The Black American female owner of an MBE- and WBE-certified professional services firm reported that it took a prime 120 days to pay her on a very large project while she was paying her staff every two weeks. Since payment was not timely, she had to contact the owner, hire an attorney, and file a complaint. [PF#9]
- The non-Hispanic white female owner of a WBE- and DBE-certified specialty contracting firm identified a payment issue on INDOT transportation contracts. She recommended processing payments every two weeks, because she needs to cover materials and the labor expenses. "Thirty days is too far, because they never stick to 30 days. It goes to 60 and then 90." [PF#13]

Licenses and permits. Certain licensing or other approvals are required for both public and private sector projects. A number of business owners and managers reported that licensing was not an issue for them. For example, the non-Hispanic white male representative of a majority-owned specialty contracting firm stated that the company had to go through the Secretary of State's office to get qualified to do work in the State of Indiana. There is also a requirement to be a member of a state licensing board. He further stated that there is no financial requirement. [#17]

Other keys to success. A number of businesses mentioned keys to their success that do not fall into the above categories. For example:

- The non-Hispanic white female owner of a WBE-certified professional services firm pointed out that she uses social media for networking and business development. She uses a lot of telephone calls, conference calls, and the internet. She has a website and has gotten inquiries from all over the country. [#5]
- A Hispanic American female owner of an MBE- and WBE-certified professional services firm reported that another key to success was her education and getting her degree. She said she took finance classes and talked with entrepreneurs who gave her knowledge about being financially sound and running a fiscally conservative business. This was especially important in her business. [#7]
- A Subcontinent Asian American male owner of a professional services firm mentioned that compliance issues can sometimes be a problem or barrier to success. He said, "The compliance stuff. It's not tough in a sense of it's hard to meet, but it is in a sense of what exists out there other than what my accountant tells me I

have to do... Every so often I get a letter that says I forgot to file this report, such as the business entity report ...Those things pop up all the time." [#21]

- When asked about keys to success, a Black American male owner of an MBE-certified specialty contracting firm pointed out that time management skills are important, along with business management skills, building a team, honesty, and trust in people. He said, "It's learning the lingo of the business, the ins and outs, being informed as an owner, and knowing about code enforcements." [#22]
- A Black American male owner of an MBE-certified goods and services business indicated that a key factor to success for him would be to negotiate his own deal to get a percentage of the sales. [#27]
- A non-Hispanic white male owner of a goods and services firm mentioned that a new business needs to join a networking group, such as at the Chamber of Commerce. He stated that you can quickly get some good qualified leads. He reported that it is good for a business to have a business plan. He stated that the Chamber of Commerce can help out with that through their SCORE program of retired executives. [#31]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm pointed out that some keys to success are networking, sales, finance and cost controls, producing quality products, and customer service. [#36]
- When asked about the keys to success, a Hispanic American male owner of a professional services firm reported, "The number one key is being flexible." He went on to add that the ability to learn new things is also important. [#38]
- When asked about other keys to business success, a Hispanic American owner of a specialty contracting firm suggested, "Give up sleep." He stated that one must give up a personal life, "You give up a lot of your outside professional life and hobbies to be successful ... but then, when you are successful, you get all that back tenfold." He said that he tries to help other people by giving them choice of work and work locations, but "100 percent of the time now, they all seem to fall short ... because nobody wants to give up their sleep." [#41]
- When asked if there were other keys to business success, the Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm listed the ability to persevere and get past hard times. She noted that she and her family have sacrificed for the success of the business. [#51]
- A non-Hispanic white female owner of a WBE-certified professional services firm reported that another key to business success is "Leadership, ... especially when you are in a situation like where we were where there was no money for a while ... our people stayed." Her company's goal as a business is to help a charity in the community, and the end game includes funding a charity that aligns with their community-focused philosophy. She said, "We like to help in the community. The end game isn't about us; the end game is we have an idea of what kind of a charity we want it to be, and we want to fund it ... The money's going to help others." [#52]

- A Black American partner in an MBE-certified specialty contracting firm stated that an important aspect of being successful is having a steady cash flow. [#53]
- A non-Hispanic white male representative of a majority-owned specialty contracting firm explained that a key to success in the construction industry is participating in outreach events that allow small and new firms to get to know the contractors in the field. [#54]
- A non-Hispanic white female owner of a WBE- and DBE-certified construction firm explained, "As long as get your financing in line, bonding, good employees you can trust, and you treat your customers right, that is all you need." [#55]
- The non-Hispanic white female owner of a WBE-certified professional services firm indicated that her key to success is perseverance. She stated, "I pride myself on service and quick turnaround time, [as well as] ... the fact that I'm so close, I can get there within 10 minutes, find out what they need, get back here, and get a quote right away." [#56]
- The Subcontinent Asian American male owner of a goods and services firm stated that for business success, he tries to "keep it simple," and went onto explain that good service and good quality, along with the "cheapest price in the world," are keys to his business success. [#58]
- When asked about the general keys to success, the Hispanic American male owner of a specialty contracting firm responded, "Definitely marketing and follow-up; follow-up is a must. The one thing that we've found in working is that once you make that contact with the person ... [follow] back up with them. Also, [provide] a good service [and be] honest. In any industry there are always fly-by-nights, [be] honest with the customer. [Make] sure you understand what they're saying, and vice-versa." [#62a]

  He continued, "The other thing is how you dress ... [In] our industry, we've seen this from going to the supply house to being in a [job location]. A lot of our competitors wear jeans and things. We wear khakis and [polo shirts with a collar] ... we're a professional company." [#62a]
- When asked about other keys to success in her industry, a Hispanic American female owner of a professional services firm reported that quality resources, compensation, and training are important. [#64]
- When asked about the keys to business success, a Black American male owner of a professional services firm stated that the most important thing is growth. He elaborated, "If you're not growing, you're dying. You gotta grow. You have to have the people with the skills and capabilities to enable your growth." He further explained that you have to rise to a specific point to be able to work well with clients. They look for people with the skill sets to grow. He expressed that quality of the work and monitoring of quality are very important, and that you cannot sustain growth without quality of work. [#67]

  When asked about other keys to business success, the same business owner

indicated that Indiana was not doing enough to help minority-owned firms be successful. "Indiana has a goal, not a requirement ... of 5 percent minority firms through a state regulatory process to say, 'yes, you are a minority, and you have to sustain that ... I think what is a crime is [that] Indiana puts you through ... hoops, and all you get is a 5 percent goal. That's chicken feed, and it's an insult. All the [larger] firm has to do ... is say, 'It's not a requirement, and we determine we [aren't] sharing [anything].'" [#67]

- The non-Hispanic white female owner of a professional services firm stated that "putting yourself out there" is important. She added that she might send 10 queries and receive only one reply. [#68]

D. Doing Business as a Prime Contractor or as a Subcontractor

Business owners and managers discussed:

- Mix of prime contract and subcontract work *(page 58)*;
- Challenges for small businesses to work as prime contractors or consultants *(page 61)*;
- Prime contractors' decisions to subcontract out work *(page 64)*;
- Subcontractors' preferences to work with certain prime contractors *(page 67)*; and
- Subcontractors' methods for obtaining work from prime contractors *(page 69)*.

Mix of prime contract and subcontract work. Business owners described their experience as prime contractors and/or subcontractors.

Many firms that the study team interviewed reported that they work as both prime contractors and as subcontractors. [e.g., #5, #8, #13, #17, #19, #20, #24, #26, #30, #32, #43, #51, #53, #54, #55, #59, #61, #64, #65, #66, #71a, #74, #75, PF#1, PF#12] Examples of comments from the in-depth interviews include:

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female reported that about 30 percent of the firm's projects are prime contracts, about 40 percent are subcontracts, and about 20 percent of the time, the firm is a team partner or a partial prime. [#3a]
- The Black American male owner of an MBE-certified construction supply company said that his company will sell directly to customers and sometimes work as a supplier to a prime contractor. [#6]
- A Hispanic American female owner of an MBE- and WBE-certified professional services firm said that, until recently, all their public work has been as a subcontractor, and that their private work is almost always as a prime contractor. [#7]

- A non-Hispanic white female representative of a majority-owned construction firm reported that 50 percent of the firm's work is as a prime contractor and 50 percent is as a subcontractor. [#34]
- The male representative of a professional services firm owned by a Subcontinent Asian American male reported that the firm acts as a prime contractor about 40 percent of the time and a subcontractor about 60 percent of the time. [#42]
- A non-Hispanic white female representative of a majority-owned specialty contracting firm reported that the firm acts as a prime contractor 60 percent of the time and as subcontractor 40 percent of the time. She noted that the firm started doing more prime contractor work than subcontractor work a few years ago. [#44]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm reported that he has done work as both a prime contractor and a subcontractor, and that the mix between the two is about 50/50 now. He indicated that most of his federal work is as a prime contractor, and most of his state work is as a subcontractor. [#57]
- A Subcontinent Asian American male owner of an MBE-certified professional services firm reported that his firm works as both a prime contractor and subcontractor. He added that 20 percent of the firm's work is as a prime contractor, and 80 percent is as a subcontractor. He stated, "Eventually, we want to be a prime contractor more than a subcontractor. It is a preference. Prime means you [have to take] more responsibility." He further commented that much of it depends on the owner's goals. [#49]
- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners reported that their members work as both prime contractors and subcontractors. She added that the members who act as prime contractors are generally the larger businesses. [#45]
- The Hispanic American male chair of an Indiana minority-focused business council reported that most of his membership includes smaller businesses, and that they do more subcontracting work than prime contracting work. He estimated that his members do about 80 percent subcontracting work and 20 percent prime work. [#46]

Some firms that the study team interviewed reported that they primarily work as prime contractors. [e.g., #15, #27, #28, #31, #32, #36, #56, #58, #67, #73] For example:

- When asked about performing work as a subcontractor, a Black American male owner of a professional services firm stated that he does not "believe in it." He explained that doing subcontract work cannot be a large part of the practice. He said, "Subs do a component, and then they are gone." [#67]
- The non-Hispanic white female owner of a WBE-certified professional services firm indicated that she prefers to work as a prime contractor and stated that she does not have difficulty being the prime contractor. She went on to note that the biggest challenge is just getting the job. [#30]

- A Hispanic American owner of a goods and services firm reported that 100 percent of their work is as a prime contractor both for commercial and residential work. [#33]
- The non-Hispanic white male representative of a majority-owned construction firm reported that they do 95 percent of their work as a prime contractor and only 5 percent as a subcontractor. [#35]
- When asked about working as a prime, a Hispanic American male owner of a specialty contracting firm indicated that he does about 90 percent of his work as a prime contractor. He added, "I am not a big fan of subbing when I can get the same prime work." [#41]
- A Black American representative of an MBE-certified goods and services firm reported that this company never works as a subcontractor for anyone. The company always acts as a prime contractor and always uses its own employees. His firm does not subcontract its work to any other organizations either. [#69]
- A non-Hispanic white male representative of a majority-owned professional services firm stated that they strive to be the prime contractor on all jobs. He explained that they would rather do work as a prime contractor because it allows them to deal directly with clients. He said that working as a prime contractor also gives the firm more ownership of the project and is often more profitable. [#72]

Some other businesses reported being limited to subcontract work or having difficulty breaking into the prime contracting arena, especially when conducting work for public agencies. For example:

- A Black American female owner of an MBE- and WBE-certified professional services firm stated that, while her firm can work as a prime contractor, they have only worked as a subcontractor. She went on to describe contract exclusivity as a barrier for her firm. She stated, "Usually, I am invited to sub ... Usually it's just a small percentage you're getting. Exclusivity, it's almost like a hostage situation." [#2]
- A Black American male owner of a specialty services firm stated that he hopes to get certified as an MBE and then work as a prime contractor for state agencies. [#16]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm reported that they have to deal with the stigma of being a smaller company. He pointed out that even though his firm can do just as good a job and is less expensive, sometimes clients like to go with the larger, more well-known company that the client feels will do a better job. As an example, he said, "We had bid on a job for [an Indiana city]. We had done a lot of work for Brownsburg, Indianapolis, Speedway and others, but they said we were not big enough to handle their work. They hired a company from Lexington who then turned around and hired us as a sub. We're not big enough." [#32]
- A Black American female owner of an MBE- and WBE-certified professional services firm stated that she has faced challenges getting work as a prime contractor as a

small business. She said that it can be difficult to convince others that a small company can be a prime contractor. She said, "The Fortune 500 companies that have allowed us to be the prime contractor, they got to know us. They knew we were capable. The other ones, just from a surface perspective, if you are not on the NASDAQ, they don't feel you can. It is a 'good ol' boy' network." [#65]

Continuing on the topic of challenges as a small company, the same business owner reported, "Getting people convinced that you can do the job ... nine times out of ten, with state contracts, they've already selected the prime. We've just never been selected as a prime. Anything over $1 million, you just don't get that opportunity. If you have a smaller job, say a $25,000 job or $30,000 job ... the smaller the contract, the more likely you are to be a prime. But our jobs are always $1 million plus, so that puts us out." [#65]

Challenges for small businesses to work as prime contractors or consultants.

Business owners described their experience as prime contractors.

- A Black American male owner of an MBE-certified specialty contracting firm reported that the challenges associated with working as a prime contractor are huge. He said, "You have to be really cautious that you don't take on more than you can handle because of cash flow. You can be wiped out of business if you take on too much as a prime." [#22]

  The same interviewee noted that subcontractors are very important when he is working as a prime contractor. He said, "Your credibility is at stake with your subs. You are trying to hold them to a standard that they may not be capable of. If the subs are not performing, you wonder whether you can cut them loose for incompetence. That's the stuff you start to learn." [#22]

- The non-Hispanic white male owner of a specialty contracting firm reported that as a smaller firm, his company is at a disadvantage due to its lack of financial resources. His company often spends time price shopping for supplies. He added that it is difficult for his company to bid competitively against larger firms due to his company only being able to perform a few jobs per day. [#60]

- A Black American male owner of an MBE-certified goods and services business mentioned that there were challenges being a prime contractor as a small business. He said, "I think the things that really held me back were the knowledge and the finances ... and the confidence. I think if I had the knowledge and finances, I would have had the confidence to promote and spend more time to go out and get more business." [#27]

- When asked about challenges being a prime contractor as a small company, a non-Hispanic white male owner of a goods and services firm reported that the major challenge he has experienced is getting his people or subcontractors cleared for safety regulations with larger clients. [#28]

  The same business owner indicated that, as a small prime contractor, paperwork and reporting requirements can be difficult when working with large companies.

However, he said that he was used to dealing with that in his previous jobs, and it is not a problem for his business. [#28]

- A non-Hispanic white male owner of a goods and services firm stated that he was unable to bid on a project because he is a small business and cannot get workman's compensation insurance. He indicated that the customer required that coverage, and since he couldn't get it, he had to pass on the business. [#31]
- A Hispanic American male owner of a goods and services firm reported that his business has challenges working as a prime contractor because they are a small business. He said that the requirements for state jobs can be overwhelming, and it can be difficult for his business' customers to get the appropriate financing and bonding. [#33]
- The non-Hispanic white male representative of a majority-owned construction firm pointed out that the main challenge for his firm is competition and landing the job. [#35]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm mentioned that she faces challenges as a minority-owned business. She said that because she has been doing a lot networking, but she has not yet obtained any public agency contracts. She said that she thinks there must be some kind of barrier that they are not aware of that is holding them back. She said, "We network and talk with people. They tell us that if something comes up, they will contact us. But we never hear from them." [#36]
- A non-Hispanic white female representative of a majority-owned specialty contracting firm she is concerned about liability when her firm is a prime contractor. She stated, "The one thing that concerns me ... which we're definitely working on trying to get better at, is the liability portion of it. Unfortunately, it seems like our country is very prone to go to legal action very quickly, so [we have to make] sure that we have strong subcontractor agreements ... [and] that all of our subcontractors have the appropriate insurance coverage ... [At] this point, [it is] not required that they bond any of their work, but that may happen the larger we start bidding." [#44]
- The non-Hispanic white male representative of an Indiana small business development center indicated that there are challenges for small businesses that work as prime contractors. He stated, "A lot of it is finances, since the state pays 30 days, or whatever, after it is received. A lot of it might be identifying those opportunities within the bidding process itself. Some are better than others ... There are a lot of core instances when I have had businesses frustrated throughout the process." [#47]
- A Subcontinent Asian American male owner of an MBE-certified professional services firm indicated difficulty in securing prime contractor opportunities. When asked about getting work for the state, he said, "In general, it happens only like once in 1,000 times." [#49]

The same interviewee went on to comment that he would have more opportunities to be a prime contractor if the state were to break up large contracts into smaller ones. He added that this would encourage small businesses like his to grow. [#49]

- The non-Hispanic white female representative of a trade organization cited the lack of personnel as an example of a challenge that small businesses face when pursuing work as a prime contractor. [#50]
- When asked about challenges small businesses face in obtaining work as a prime contractor, the non-Hispanic white male veteran owner of a SDVOSB-certified construction firm stated, "The federal government, because of the paperwork load ... A lot of places you go, they want the safety engineer, a quality engineer, all this kind of stuff. We usually have one guy wear all those hats. On small jobs, they kind of don't push that as much, but on bigger jobs, they do. It's definitely a manpower deal sometimes. You almost need a Project Manager. On big government jobs, you need somebody to just follow around your subs because people don't always do what they are supposed to do." [#57]
- The non-Hispanic white male owner of a construction firm reported that it is challenging for a small company to work as a prime contractor. He stated, "Paperwork, meeting all the issues that the public sector needs to verify ... it just seems like it's endless." [#61]
- When asked about challenges related to being woman-owned, the non-Hispanic white female owner of a professional services firm indicated that she does not see any additional challenges for a woman-owned firm. She explained that disadvantages in a business like hers include cash flow. If someone does not pay for the services she provides, she said, "I am not going to file suit" because it would cost too much.[#68]
- When asked about working as a prime contractor, a Native American owner of a non-certified construction firm stated, "It is all about organization, quality of work, customer relations, and being honest ... It's a lot of respect ... mutual respect." [#71a]
- When discussing challenges as a woman-owned firm, the non-Hispanic white female owner of a WBE- and DBE-certified professional services firm said that the hardest thing has been trying to be a "high-caliber" firm that is able to compete with the large, local firms. She reiterated that market competition from bigger firms has been the biggest challenge. [#73]
- The non-Hispanic white male owner of a goods and service firm indicated that he finds it difficult to win prime contracts. He stated "Big companies have management companies that usually outsource or hire outside of Indiana to run their kitchens and so forth that make it difficult to be hired locally. " [AI#20]
- The non-Hispanic white male owner of a roofing company indicated that it is difficult for a small business to compete against low-bidding prime contractors. He stated that some contractors, or "storm chasers," are often not truly qualified and

rely on illegal labor so that their bids are extremely low-priced. He felt that he could not find as much work because of these contractors. [AI#6]

- The Black American female owner of an MBE- and WBE-certified professional services firm reported that she has been in business for nineteen years, and her experience is that the minority architects do not normally get their share of the services. She added that in the architecture industry, it is very difficult to infiltrate the existing networks of architects from large companies. [PF#9]

  The same business owner said that out of the six minority architects that actually worked on the airport, "there are only maybe three of us that are really still in business from that, three, because the other three really aren't getting any work, and they've either gone back to one-man shops where they aren't getting any work, or they've gone into another profession altogether." [PF#9]

Prime contractors' decisions to subcontract work. The study team asked business owners whether and how they subcontract out work when they are the prime contractor.

Some prime contractors said that they usually perform all of the work or subcontract very little of a project. [e.g., #36, #60, #62a, #62b] Examples of comments include:

- The non-Hispanic white male owner of a construction firm stated that he only subcontracts the excavating and concrete work on his projects. [#23]
- The non-Hispanic white female owner of a non-certified construction firm stated that her firm does not use subcontractors. [#24]
- A non-Hispanic white male owner of a construction firm reported that they sometimes use subcontractors, but not often. He stated, "In our industry, I try to do everything we can do in-house. I have a couple of key people that I bring in as subs occasionally, but if it's a project within our ability, we just do it ourselves." [#61]

Many prime contractors reported selecting subcontractors based on quality of work. For example:

- A Hispanic American male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female explained that when the firm is looking for a subcontractor to work with, the firm first looks at the quality of work done for that project's scope. He added that reputation and relevant qualifications are also important when selecting a subcontractor. [#3b]
- When asked about choosing which subcontractors to work with, the non-Hispanic white male representative of a majority-owned specialty contracting firm stated that it depends on the project. Some projects need specialized work, such as kitchen consultants, or a specific mechanical or electrical engineering expertise. He stated, "The first thing we judge ... is what kind of project we have. Do we have a school, jail, prison, airport ... what's the project? Then we look at who's competent in that project type. Then we determine who we want for that project because it is all about the recipe. It's like cooking a cake. You put the recipe together, and if you

miss one thing, the cake can go flat. So, it's the right recipe of people that come together to really become a successful team ... We don't really price their fees. We know what our fee is, we know what the split should be based on the project type. So, we say, 'This is the number you have to be at.' Rarely do they argue." [#17]

- The non-Hispanic white female owner of a WBE-certified professional services firm pointed out that they often use small and minority- or woman-owned companies as subcontractors when she is a prime contractor. She said that these small companies have always done a great job, and she has enjoyed working with them. She said, "They have been responsive. If you get the service that you need, honesty, and open communications, then I don't think it matters if they're large or small. Because in our industry, the reality is that even if you are working with a large firm, you are still working with a small team at that firm." [#30]
- A Subcontinent Asian American male owner of an MBE-certified professional services firm reported that he hires subcontractors when he works as a prime contractor. He chooses subcontractors by reaching out to MBEs that he knows can do the kind of work he needs. He also takes their résumés into account. [#49]
- A non-Hispanic white male representative of a majority-owned specialty contracting firm explained that there are quite a few DBEs out there that are extremely reputable, and his firm works well with them whether they have the ability to provide the percentage requirements or not. He went on to explain that there are times when his firm will bring on subcontractors that are designated as DBEs, even if they do not need them to meet a goal, simply because they are great companies to work with. [#54]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm indicated that the decision on using subcontractors is based on several factors. He stated, "One depends on how busy I am [and] how spread out my manpower is. The other thing is [that] it just depends on our expertise." He said that he prefers to use subcontractors that he knows as well as local companies. If he has to go elsewhere, he asks around to get an idea of the reputation. [#57]
- The non-Hispanic white male owner of a specialty contracting firm commented, "Just over the years, seeing which ones do good work and which ones don't. You can tell [very] quick[ly]." He also stated that he uses the same group of subcontractors regardless of whether it is a private or public project. [#59]

Some prime contractors require subcontractors to prequalify to conduct work on their teams. For example, the non-Hispanic white female owner of a WBE-certified professional services firm stated that she interviews and qualifies each new subcontractor. She said that it is important that she knows about their experience and what makes them an expert in their field. She mentioned that she has dropped some people because they were unable to answer her questions to her standards. [#5]

Many prime contractors indicated that they use the subcontractors with which they have an existing relationship. Both majority-owned and MBE- and WBE-certified firms that use subcontractors said that they tried to use subcontractors they have used on past jobs or otherwise know. [e.g., #36, #55, #60] Examples of interviewee comments include:

- A Black American male owner of a DBE- and MBE-certified professional services company pointed out that he chooses subcontractors by word-of-mouth and usually works with subcontractors that he already knows. He added that he has had good experiences with the minority- and woman-owned subcontractors he has worked with. He said that he usually asks people in his network about subcontractors' reputations before hiring them. He said that he also does a background check on them. [#19]
- The non-Hispanic white male representative of a majority-owned construction firm noted that his firm typically works with the same subcontractors. He said, "We have an irrigation sub we have worked with for almost eight years now." He pointed out that they have always had good relationships with their subcontractors because they are using the same ones. [#35]
- A non-Hispanic white male owner of a construction firm reported that he has some subcontractors he uses on a regular basis in his local area. If he goes to a different area, he will look for someone in that area. He expressed that it can be difficult to find good subcontractors and stated, "I guess I'm like anybody else. I try to find out as much about the [subcontracting] company as I can." [#61]
- A non-Hispanic white female owner of a WBE- and DBE-certified construction firm stated that her company does prefer to work with certain subcontractors because they trust them. [#55]
- The non-Hispanic white male representative of a majority-owned construction firm reported that the best way for a company to find good subcontractors is to network with other companies. He added, "We have a pool of subcontractors we like to work with. However, we are not exclusionary. Show us your experience and financials, and we'll give you a chance." [#66]
- A non-Hispanic white male owner of a goods and services firm stated that the only challenge to being a small business is getting the opportunities to work. He said, "When I got the business with the state, it's because the person in charge of doing it was a local person and knew me. They sent me over stuff to bid on. They take our catalog and use it for the specs, and we invariably get the order. But when they both retired, I don't get any of that anymore." [#25]

Some interviewees reported differences in who they select as subcontractors for public sector versus private sector work. For example:

- When asked how his business partnered with subcontractors, the Hispanic American male owner of an MBE-certified construction firm stated, "A lot of it is based on relationships. On the public works jobs, those, of course, are low bidders. Because if we don't use the low-bid guy, then somebody else will, and then we

won't get the work." He added that on private contracts they choose the subcontractors that best fit the project. [#13]

- The non-Hispanic white male representative of a majority-owned construction firm stated that there are differences between the subcontractors they might hire for a public job versus a private job. Public jobs sometimes require different standards or experience levels. He added that in the public sector they are "encouraged to work with disadvantaged businesses." He stated, "These are hard to find, especially in central and southern Indiana." He went on to report that he does not believe he has ever been denied work because he did not have a disadvantaged business included on a project. [#66]

Some Interviewees indicated that they do not generally look to hire DBE-, MBE-, or WBE-certified subcontractors specifically or had bad experiences with those subcontractors in the past. For example:

- A non-Hispanic white male owner of a construction firm stated, "Aren't most businesses disadvantaged today? It seems like everybody has a certification for something." He went on to state, "That doesn't make any sense to me, but, you know, that's the way a lot of people play the game. I find [that] it's become laughable." [#61]
- The non-Hispanic white male owner of a construction firm noted that he used a woman-owned subcontractor in the past, and it was not a good experience. He stated that he had to take the work elsewhere to get it done. He said, "It was not good. She went into this woman-owned business not because she was a woman and disadvantaged. She went into it thinking all these people would have to give her work regardless of the quality of her work."[#23]

  The same business owner also indicated that he had a good experience working with a minority-owned business in the past. However, he stated that there are not a lot of minority-owned companies or contractors in his area. [#23]

Subcontractor preferences to work with certain prime contractors. Business owners discussed whether they preferred working with certain prime contractors.

Some interviewees mentioned speed and reliability of payment as reasons to prefer certain prime contractors and avoid others. Comments include:

- A non-Hispanic white male veteran owner of a construction firm mentioned that timely payments can be a problem for a small business as a subcontractor. He said that he sometimes will decline a job because of the reputation of the prime contractor. He stated that he knows some friends who were owed large sums of money from prime contractors and went out of business because of it. [#10]
- A non-Hispanic white female owner of a WBE- and DBE-certified construction firm stated that her company does have preferences for working with some prime contractors based on relationships and ease of working with them. She added that how quickly some prime contractors pay subcontractors is also a factor. [#55]

Some interviewees described the negatives and positives associated with working with prime contractors. Comments from the in-depth interviews include:

- A Black American female owner of an MBE- and WBE-certified professional services firm talked about her experiences working with prime contractors. She said, "I do have preferences on the primes that I work with. I worked with the same [prime contractors] since the beginning, and I've been very blessed that they have adopted me as the MBE. They have been great on that side of it but not on the business development side of it." She added that they say they want to help the firm grow, but she does not see that. She said, "I would like to see primes in my business be more innovative in their thinking and utilize more subs." [#2]
- The Black American male owner of an MBE-certified specialty services firm stated that he has had some problems with treatment by prime contractors. He mentioned that prime contractors try to transfer as much risk as they can on all the smaller companies, including MBE and WBEs that are trying to "get their foot in the door." He said the prime contractors know the small company needs the business, so they try to get the MBE or WBE to take more risk. He said that an example of this is when the prime contractors try to get him to guarantee the warranty or delivery time on a product. He added that he tells the prime contractors they need to get that from the manufacturer. It is not his responsibility. [#6]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated that the biggest challenge in being a subcontractor is staying on the project after the contract is awarded. She noted that some general contractors or developers will try to drop subcontractors after they win a contract, as they prefer to retain the work for themselves. [#30]
- A Hispanic American male owner of a professional services firm reported being hired as a subcontractor to prevent him from taking the prime contractor's business. He went on to comment that this was not a negative experience. Both parties received work. He still maintains a good relationship with the prime contractor. [#43]
- As far as subcontracting work, the representative of a Hispanic American-owned non-certified specialty contracting firm stated, "We have had companies call and request us. We've always had a concern if we were ready to pursue it, and if they were willing to pay us on the terms we want." [#62b]
- A Black American female owner of an MBE- and WBE-certified professional services firm stated, "I've had prime companies that if I ever work with them again, the things that they failed to contractually do, I would make sure that I had legal documents so they couldn't get me again. I can say that with their deep pockets and how they like to finagle the dollars they owe you. For example, they could owe you $350,000 at the end of the contract when you do the settlement, and you ask for your money. They say they don't want to pay you that, so you go to mediation and get half." [#65]

The same business owner also noted that there are challenges working with prime contractors as a minority-owned and woman-owned business. She stated, "I had one person recently tell me that they already had their MBEs. They had two. Why can't we just be slotted?" [#65]

- A non-Hispanic white female owner of a WBE-certified professional services firm reported challenges related to being a woman-owned business and working as a subcontractor. She said that as a subcontractor to a large, national customer, "They kept promising us that when we were certified we were going to have so many more opportunities for business. We saw nothing, absolutely nothing. They buy on price. They try to say that they care about all these other things, and it's not true. There's no money in it. The biggest challenge with being a subcontractor is there's no margin. They don't pay you for any of the value added ... they scoop all [the profit] up ... you have to sign a non-compete with them." [#52]

  This business owner added, "The challenge [as a] woman-owned business [is that] some companies believe that it is politically correct and it sounds good for their company to say that they really want to partner with woman-owned businesses or with minority businesses ... but I am not sure that they mean it ... it's not part of their culture that they really want to partner with businesses." [#52]

Subcontractors' methods for obtaining work from prime contractors. Interviewees who worked as subcontractors had varying methods of marketing to prime contractors.

Several interviewees said that they get much of their work through prior relationships with prime contractors. [e.g., #10, #32] For example:

- When asked how he gets work as a subcontractor, a non-Hispanic white male owner of a construction firm stated that he used some connections with general contractors that he had from his previous job. He also said, "Now that I'm listed as an approved vendor [with a specific customer], I have general contractors calling me on jobs." [#18]
- The non-Hispanic white female owner of a non-certified specialty contracting firm noted that she learns about subcontractor work through her relationships and contacts. [#8]
- A Black American male owner of a specialty contracting firm said an added benefit of being a subcontractor is that subcontracting helps develop relationships and gets his company name out there in front of other contractors. [#40]
- A Subcontinent Asian American male owner of an MBE-certified professional services firm reported that he gets subcontract work in the private sector via word-of-mouth and positive reputation based on past performance. [#49]
- The Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm said they have some longstanding relationships with other companies and are among many subcontractors in the industry. They perform most of their work as subcontractors and have formed an informal internal network where people with whom you have relationships call you to help them with work.

Because there is a cycle to their work, she stated that, as a subcontractor, they are experienced and they plan ahead. They always know when to go in and at what interval in the construction or maintenance cycles. [#51]

- A non-Hispanic white male owner of a construction firm indicated that he sometimes uses prior connections with prime contractors to find work. He stated, "I look for opportunities in multiple places, and I try to avail our company to be used by anybody." [#61]
- A Black American female owner of an MBE- and WBE-certified professional services firm indicated that she gets work as a subcontractor by various methods. Sometimes previous clients call her. Sometimes she responds to requests for proposals or government solicitations. She said that she gets a lot of repeat business from previous clients. [#65]
- When asked about working as a subcontractor, the non-Hispanic white male representative of a majority-owned construction firm commented, "I talk a lot. I have networking relationships. I hear things that are happening in Indiana, Kentucky, and Illinois." [#66]

A number of business owners reported that they actively market to prime contractors. Those businesses reported that they sometimes identify prime contractors from bidders' lists, plan holders lists, at pre-bid or pre-proposal conferences, or through outreach events. [e.g., #36, #55, #65]

- The non-Hispanic white female owner of a WBE-certified professional services firm mentioned that finding out about subcontractor opportunities can be tough, especially in a new market. She stated that in markets they know, they reach out to the prime contractors and companies they know in order to stay top-of-mind with them for any new projects. [#30]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm pointed out that they can obtain work as a subcontractor by searching the RFPs at the City of Indianapolis website, the state website, and the letting schedule for INDOT and contacting the prime contractors. He noted that they are going out and making the contacts, the primes are not contacting them. He said, "No one comes looking for you." [#32]
- A Black American male owner of a specialty contracting firm explained that he first got work in the private sector. He added that he is a subcontractor to a warranty company. He said that he learned about the opportunity through a contact of his, and then went online and contacted the warranty company. [#40]

Some business owners reported routinely being solicited for bids from prime contractors. [e.g., #36] Comments include the following:

- Regarding how he finds work, a Subcontinent Asian American male owner of an MBE- and SBE-certified construction firm said that many prime contractors send

him invitations to bid. "I'm getting to be very well known. I have a lot of general contractors who contact me." [#12]

- When asked about getting work as a subcontractor, the non-Hispanic white male representative of a majority-owned specialty contracting firm stated, "Sometimes people come to us by our reputation. Sometimes we find out about the work, and we try to decide who to team with." He further stated, "Once we have surveyed the landscape, then we pick the contractor that we want to go with." He added that that price is not often a consideration for getting work as a subcontractor. [#17]
- The Black American male owner of a DBE- and MBE-certified professional services company reported that he learns about subcontracting opportunities through word-of-mouth and calls that he receives from general contractors. He stated that he tries to do a good job and complete the work on time. He said, "By doing that, you build a good reputation ... and then the word gets around." [#19]
- When asked how his firm finds out about subcontractor opportunities, the non-Hispanic white male representative of a majority-owned construction firm noted that clients will call them due to their reputation. [#35]
- The non-Hispanic white male owner of a specialty contracting firm said, "There are several [prime contractors] here in the community. If they have work, they give us a call." [#59]

Some businesses noted that identifying prime contractors on particular projects can be difficult. For example:

- A Hispanic American female owner of an MBE- and WBE-certified professional services firm reported that a challenge is finding the prime contractors. She said, "You really don't know who is priming it. They have a sign-in sheet. They have a RFP. But you don't know who is really going to prime. And sometimes, you don't even know who is considering being a prime." [#7]

  She pointed out that they had to learn how to find out about past project winners. She said, "Knowing how to work the system and what to do can be a competitive advantage for companies that have been working with the state for a while." [#7]

  When asked how the process for finding out who the prime contractor is could be improved, she stated that requiring the prime contractors to show up at the pre-proposal conferences would help. She also mentioned that having them sign up on the sign-in sheet as a possible prime contractor could help. [#7]
- When asked about her biggest barrier to getting subcontractor work, a Subcontinent Asian American female owner of an MBE-certified goods and services firm said that networking and not knowing how to reach the right designers, architects, or general contractors are her biggest barriers. [#36]

  The same interviewee also reported that they are interested in government work. She said that she went to the meeting about the new Justice Center in Indianapolis. She stated, "You don't really know how to use the system. It was a huge contract. All the [work her firm provides] is part of the major construction. So, we would be a

subcontractor on the project. It is tough to find out who are the A contractors or prime contractors ... How do we go about contacting them or know who they are?" [#36]

Some business owners reported that the internet or social media were important marketing tools for them. [e.g., #23] For example:

- The non-Hispanic white female owner of a specialty contracting firm noted that she attracts subcontracting jobs through advertising. She said she advertises on the internet, Google, and in the phone book yellow pages. She said, "I Google really well because if you Google [my specialty] in a bunch of surrounding towns, my ad comes up [quickly] ... So I do get a lot of business where people don't know me, don't know the area, they're out of state or out of the country, and they need [my services] in this area." [#8]
- A Black American female owner of an MBE- and WBE-certified professional services firm stated that the company has a website and uses social media such as LinkedIn. The company does some advertising, but also relies on word-of-mouth advertising. She further stated that she welcomes more exposure. [#65]

E. Potential Barriers to Doing Business with Public Agencies (in general, and Indiana state agencies specifically)

In addition to barriers such as access to capital, bonding, and insurance that may limit firms' ability to work with public agencies such as IDOA, INDOT, IAA, Hoosier Lottery, and seven SEIs (i.e., the participating entities), interviewees discussed other issues related to working for public agencies. Topics included:

- Learning about prime contract opportunities *(page 73)*;
- Learning about subcontract opportunities *(page 78)*;
- Opportunities to market the firm *(page 80)*;
- Bonding requirements and obtaining bonds *(page 82)*;
- Insurance requirements and obtaining insurance *(page 83)*;
- Prequalification requirements *(page 85)*;
- Licensing and permits *(page 86)*;
- Size of contracts *(page 87)*;
- Any unnecessarily restrictive contract specifications *(page 88)*;
- Prevailing wage, project labor agreements, or any requirements to use union workers *(page 90)*;
- Bidding processes *(page 91)*;
- Non-price factors public agencies or others use to make contract awards *(page 94)*;
- Timely payment by the agency or prime *(page 96)*;

- Recommendations for improving state agencies' or public colleges' bidding and other processes *(page 99)*; and
- Any additional disadvantages or barriers based on being a minority- or woman-owned small business *(page 102)*.

Learning about prime contract opportunities. Interviewees discussed opportunities for firm owners and managers to identify public sector work and other contract opportunities, and to market themselves.

Many business owners and managers identified straightforward ways to learn about public and private sector work. [e.g., #5, #7, #14, #18, #19, #34, #37, #40, #53, #60, #64, #69, #74] For example:

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female reported that 90 percent of what the owner and partner do to find out about work is read a lot of articles in industry. The owner and partner follow and subscribe online to Bidclerk. That allows them to know what jobs are coming. They also do media searches and get out in the community to hear about jobs. [#3a]
- The Black American male owner of an MBE-certified specialty services firm reported that he does not have any problems with learning about contract opportunities that are available. He said he learns about contract opportunities in several ways, such as receiving email notifications of bidding opportunities from agencies such as the City of Indianapolis, the state, and on private projects. He said he gets them all day long. He also said that prime contractors send him emails about opportunities for MBE participation. [#6]
- A non-Hispanic white male representative of a majority-owned professional services firm remarked that his firm's sales people mainly rely on networking to find out about new opportunities in both the public and private sectors. [#20]
- The non-Hispanic white female owner of a WBE-certified professional services firm indicated that, to learn about new opportunities, they spend as much time as possible with the key decision makers at the public agencies and universities. She said they try to get one-on-one meetings with them or go to conferences to find out about available and upcoming opportunities. [#30]

  The same interviewee went on to note that they use the project websites at the various universities. She said, "If you're in the business, you know the sites and what's coming up." [#30]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm stated that he has not had problems finding out about contracting opportunities, but noted that he has to go out and find the opportunities himself because the public agencies are not reaching out to his firm. [#32]
- Regarding learning about prime contract and subcontract opportunities, the Hispanic American female owner of an MBE- and WBE-certified specialty

contracting firm indicated that she has no problems learning about opportunities. When asked about state and state universities, she commented that "they are fairly well-announced." She noted that she watches the state construction trends and also receives emails from IDOA. In addition, general contractors contact her to pass along information. [#51]

- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm noted that he uses many websites to find work for the state and federal government. He also hears about jobs by word-of-mouth. He stated, "I would like to bid on more stuff here in the county. In this county, I get all the bids because I know the county engineer. In the other counties, I don't know how they post that stuff. It is hard to find their postings. In Indianapolis, with the state stuff, I go on the state's website." [#57]
- The non-Hispanic white male owner of a specialty contracting firm indicated that he learns about opportunities primarily by word-of-mouth and said that some companies will call him. [#59]
- A non-Hispanic white male owner of a construction firm reported, "I use the state website. I also try to make contacts throughout the state, although they haven't panned out very well. I pretty much hear about them through the internet or word-of-mouth." [#61]
- When asked about how the company learns about prime contract and subcontract opportunities, the non-Hispanic white male representative of a majority-owned construction firm indicated that it is most often done through networking. He reported no difficulty in finding opportunities to bid. [#66]
- The non-Hispanic white female representative of a majority-owned professional services firm explained that her firm generally learns about opportunities via phone inquiries. She went on to state that she does not think there are barriers to working within the public sector. [#70]

Many interviewees commented that they use websites to identify potential work. For example:

- The non-Hispanic white female owner of a WBE-certified professional services firm indicated that to her firm uses project websites at the various universities. She said, "If you're in the business, you know the sites and what's coming up." [#30]
- When discussing finding work opportunities as a prime contractor, a non-Hispanic white female owner of a WBE- and DBE-certified construction firm noted that she uses a bidding website to find out about jobs. She often visits the websites of surrounding cities. [#55]
- When asked how she learns about contracting opportunities, a Black American female owner of an MBE- and WBE-certified professional services firm indicated that the company has one staff member that searches the state website for opportunities. Often, she finds out about opportunities through repeat customers. [#65]

- The non-Hispanic white female owner of a non-certified professional services firm stated that she learns about jobs via websites. She also said that she sometimes searches the internet using Google. [#68]
- The non-Hispanic male white representative of an Indiana small business development center reported that if a business calls them in search of work, he refers the business to IDOA. He added that the Indiana Procurement Technical Assistance Center can help get them set up to monitor the state websites for opportunities. [#47]

Several small business owners reported barriers when attempting to identify or secure certain contract opportunities with the participating entities and other public agencies. Examples from the in-depth interviews include:

- The non-Hispanic white female owner of a WBE-certified goods and services firm indicated the only way she learns about contracting opportunities is when someone from the agency calls her business to ask for a service. She only sees RFPs for services her business does not perform (e.g., construction). [#1]
- A Black American female owner of an MBE- and WBE-certified professional services firm said that learning about available opportunities via RFPs is not difficult. However, she went on to note, "The barrier is finding out [about] what is not being advertised." She is referring to state agency contracts that are valued low enough to where they do not need to be publicized. [#2]
- A Hispanic American female owner of an MBE- and WBE-certified professional services firm indicated that many state contracts are not listed or put up for RFP. She said, "The State, if they can keep it under a certain dollar amount, don't have to publicize it. And, I think there are many [contracts] in my industry that they don't publicize." [#7]

  The same interviewee also mentioned that she believes there is a dollar threshold of about $50,000 to $75,000, and if they keep it below that, they don't need to send out an RFP. She noted that there can be four $50,000 contracts that never go public, and commented, "These size contracts would be fabulous for small businesses, but they are going to the big businesses because they know how to work the system." [#7]
- A Subcontinent Asian American female owner of a professional services firm reported that they did not sign up with the state to get alerts on new business opportunities because there was a fee. She commented, "I tried to sign up, but there was a fee every year or month." [#9a]
- When asked how he learns about prime contracting and subcontracting opportunities with public agencies, the non-Hispanic white male representative of a majority-owned professional services firm stated, "I don't know how to even look for that." He explained that he was not aware of how he would learn about those opportunities. [#11]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Public works projects are not hard to find out about." However, he added, "You need to know before the thing comes out because you want to have a good relationship with people." He further stated, "The solicitations that come out ... if you go after a project where we didn't know about it and we get solicited, we're not going to get it because somebody else has a relationship in there that is more meaningful." [#17]
- A non-Hispanic white male representative of a majority-owned professional services firm noted that they sometimes find out about public opportunities after the fact. He said that it would be helpful if there was a newsletter or email alert about new opportunities. [#20]
- The non-Hispanic white male owner of a construction firm noted that he does not know where to look to find business opportunities with Indiana state agencies. He noted that because he currently does some work for a public agency, there have to be opportunities at other Indiana state agencies. He said that he is unaware of how to find them or how to present himself should an opportunity arise. [#23]
- The non-Hispanic white female owner of a non-certified construction firm indicated that learning about prime contract opportunities is a problem, because her firm does not know where to find out about opportunities. She said that that problem may be widespread. For example, she said, "When I called the City and asked why they were using a company from Oklahoma, they said it was because they were the only ones who bid on it. That's not good." [#24]
- A Black American male owner of an MBE-certified goods and services firm stated that while he would be interested in learning about opportunities with public agencies, he does not know how to do it. [#27]
- A non-Hispanic white male owner of a goods and services firm indicated that he is not a registered vendor with the state, which can be a barrier to doing business with the state. [#31]
- A Hispanic American male owner of a goods and services firm indicated that a barrier to working with the state is the time needed each day to review the various websites for any appropriate projects and then look at the project plans and prepare bids. He noted that they don't have the extra time or employees to do a good job on it. [#33]

  The same business owner also mentioned that they got a call from someone from the state about registering with the state. He said that the state person gave them three website links to check out and said, "Good luck." He noted that this was to get registered with the state to replace equipment for INDOT. [#33]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm reported that learning about prime contract opportunities has been a barrier for them. She mentioned that she needs information on who to reach out to or talk to for public agency jobs. She said, "People say nice things to you when you write to them. But there is no action after that." [#36]

The same business owner also pointed out that IAA has RFPs and smaller projects that they may send out to three to four companies. She noted that she cannot even get on the list of three to four companies to bid on the small projects. [#36]

- The Black American owner of a professional services firm stated, "It is very difficult to find out about opportunities for people who don't know how to find it." [#37]
- A Hispanic American male owner of a professional services firm commented that learning about prime contract and subcontract opportunities in Indiana is a barrier to getting work. He added, "When dealing with the state, I don't really know where to go and how to do it." [#38]
- A Subcontinent Asian American male owner of an MBE-certified professional services firm indicated that there are barriers when trying to secure opportunities with the state. He stated, "The challenge is generally that the perception is, unless you know someone or have a relationship, you are spinning your wheels to become a sub or a prime. The State could change that image and get [more] MBE and WBE." [#49]
- When asked if learning about prime contract opportunities is a barrier for her members, the non-Hispanic white female representative of a trade organization stated, "I would say yes, it is a barrier. I think if you are certified, they take you through a whole class. If you are not certified, you are just kind of out there. Everything is geared towards that certification. But, if you can't get that certification, you fall into a black hole." [#50]
- A Black American male partner in an MBE-certified specialty contracting firm stated, "I have tried everything." He added that he has marketed via TV ads, magazines, the phone book, and the internet and that none of them helped him to secure opportunities. He went on to report that he gets his work via word-of-mouth, and that he has been relying on that for "a couple of years." [#53]
- Regarding barriers related to learning about prime contract and subcontract opportunities, a non-Hispanic white male representative of a majority-owned specialty contracting firm explained that they might exist if the firm does not get out in the field and introduce themselves to other contracting entities performing work in the community. He added that barriers may exist if firms are not submitting a quote to prime contractors early enough in the process. [#54]
- When asked about learning about prime contract and subcontract opportunities, the Subcontinent Asian American owner of a goods and services firm explained, "I don't know how to ... I have not received information from the state." He noted that it would be helpful if the state would publish bidding opportunities.[#58]
- When asked how he learns about contracting opportunities, the Hispanic American male owner of a specialty contracting firm indicated that he uses the IN.gov website. He has specifically looked at opportunities INDOT and the IDOA. He stated that he is not sure about any other places to look for opportunities. He said that unfortunately, there is not a lot listed for his type of work. Most of the work is

construction. He further stated that there have been some solicitations that required a fee. [#62a]

- A Black American male owner of a professional services firm expressed that he knows nothing about opportunities in Indiana, but he gets email alerts from both Illinois and Missouri about work opportunities there. [#67]
- When asked about barriers related to doing business with public agencies, a non-Hispanic white female owner of a WBE-certified professional services firm stated, "How do you wind through the bureaucracy? Where is the best starting point? Where do you go from there? For a small business owner ... you wear so many different hats ... We don't have [a] governmental affairs department ... to investigate this and tell us how to figure [out how to do business with government agencies]." [#52]
- The non-Hispanic white female owner of a WBE-certified professional services firm commented, "I think you just get tired of opening the emails. [I] get the emails all the time, and they don't pertain to me. It would be nice if there was some way for them to just send you bid packages that you could quote on that pertain to your industry." [#56]
- The Asian Pacific American owner of a professional service firm indicated that it would be helpful to receive information on how to navigate public contracts. He stated, "We don't know how to get the contract work for the state of Indiana. We are capable of completing the work we just are not sure how to go about it." [AI#27]
- An advisor to a local labor union who submitted written testimony via email stated, "We have tried to get construction projects for years at Purdue and Indiana universities. We are qualified and have submitted bids, to no avail. We need more than a disparity study done. We need work and we need it now!!" [WT#2]

Learning about subcontract opportunities. Many companies explained that it was difficult for them to learn about subcontract opportunities. Others reported effective ways of learning about potential subcontracting, or that prime contractors reach out to them.

Some businesses reported challenges learning about subcontracting opportunities. Examples include:

- A non-Hispanic white male veteran owner of a non-certified construction firm pointed out that finding out about subcontracting opportunities can be tough because there is no easy source "under one umbrella" to check. He said, "Indiana University (IU) has their website, Purdue has their website. They are similar but not the same. They tell you about jobs coming up and being done, but not with any great detail." [#10]
- A non-Hispanic white male owner of a goods and services firm pointed out that, to help him grow his public sector business, the state can provide a website with a listing of all the opportunities. [#31]

- When asked about subcontract opportunities, the non-Hispanic white male representative of a majority-owned construction firm stated that he did not know where to find them. [#35]
- A Hispanic American male owner of a professional services firm reported that even though he is a registered vendor, the amount of opportunity in the area for state agency work is limited. [#43]
- A Black American male owner of an MBE- and DBE-certified specialty contracting firm reported that he does not know how to find out about work opportunities. He commented, "I want to work, [and] I want to grow." [#48]

Other businesses indicated that they have found effective ways to identify subcontract opportunities. For example:

- When discussing doing work as a subcontractor, a non-Hispanic white female owner of a WBE- and DBE-certified construction firm stated that she looks for the prime contractors on job websites and calls those prime contractors to discuss partnering. [#55]
- When asked about how he learns about contracting opportunities, a Subcontinent Asian American owner of an MBE- and SBE-certified construction firm indicated that he is usually invited to bid by general contractors. He looks at a bid tool publication. However, since he is never a prime contractor, he then contacts the general contractor that he believes may be bidding for that job. [#12]
- A non-Hispanic white female co-owner of an MBE-certified specialty contracting firm reported that one owner of the company tracks websites for public sector opportunities. [#63a]
- A Native American male owner of a non-certified construction firm stated that he uses an e-plan room that lists all of the upcoming jobs in his industry. He also reviews information from a Marion County website and the Governor's Action League. [#71a]

  The same business owner also reported that they attend pre-proposal meetings if it is for a project that they want to bid on and that they think they can win. He added that, in addition to being listed on the bidders list, they seek out opportunities with larger firms. He stated, "Being a smaller firm, you have to pick and choose [the meetings one attends]." [#71a]
- A non-Hispanic white male representative of a majority-owned specialty contracting firm said that his firm learns about opportunities via the 18-month letting list, the Statewide Transportation Improvement Program (STIP), and by watching various websites. He further explained that his firm has signed up for publications and other fee subscription services to find out about available jobs in the field. [#54]

  The same business owner also reported that his firm finds opportunities to subcontract by working with local economic developers. He said that his firm has relationships with the general contractors working in the field. He indicated that

those relationships allow for prime contractors to come to his firm and ask for a bid to participate in projects. He stated that relationships are very important. [#54]

- A non-Hispanic white male representative of a majority-owned professional services firm stated that, although it is hard for his company to find opportunities because their business is a "niche," the company has joined the state online registration and a couple of online bid monitoring services. He added that these are cost-effective monitoring resources for his company. [#72]

Some companies reported that prime contractors contact them about opportunities. For example:

- A non-Hispanic white male veteran owner of a VBE-certified professional services firm mentioned that he does get contacted by primes looking for subcontractors to help on projects. [#32]
- As a subcontractor, the non-Hispanic white male veteran owner of a SDVOSB-certified construction firm reported that primes reach out to him most of the time. [#57]

Opportunities to market the firm. Business owners shared a range of experiences about marketing their companies.

Some businesses reported challenges with marketing. [e.g., #13, #24, #26, #27, #47, #48, #49, #52, #56, #57, #59, #74] Examples from the in-depth interviews include:

- The non-Hispanic white female owner of a WBE-certified goods and services firm indicated there are not many opportunities to market the firm. She reported that she went to a few events at the State House designed to market the business. She added that she has set up booths with limited results, so she no longer participates in those events. [#1]
- Regarding marketing her firm to public agencies, a Black American female owner of an MBE- and WBE-certified professional services firm stated, "We don't have any advocates. It's difficult to find someone to advocate for you." [#2]
- A Hispanic American female owner of an MBE- and WBE-certified professional services firm stated that she would like opportunities to market their firm to state agencies, especially so the agencies would know her firm for the no-bid projects. She said, "The no-bid process is shrouded in secrecy. I don't know much about it, but I know it exists." [#7]

  When asked how she could market her firm more effectively, the same interviewee mentioned that for many marketing events, the right people for her industry are not there. She said someone is there but they are not the decision makers. She said, "If it's the decision makers, then it is of value. If not, then it is not of value." She noted that she needs to meet the professional services people not the procurement people. [#7]

- A Subcontinent Asian American female owner of a professional services firm commented that the state is not doing a good job in giving them opportunities to market their firm to agencies and to meet the right people. She stated, "Marketing is a challenge for companies like ours." [#9a]
- A Subcontinent Asian American male owner of an MBE- and SBE-certified construction firm stated that he really has not seen any opportunities to market his firm. He just talks to general contractors. He said, "I did some advertising several years ago ... Our market is the commercial industrial arena. I don't go after the residential work. I tried a couple of things, but it doesn't matter ... If you want the work, you are just the low bidder." [#12]
- A non-Hispanic white male owner of a goods and services firm indicated that he would like the chance to market his firm to state agencies, but that can be a problem now since he is the only employee. He said, "When I leave, there is no one here." [#25]
- A Black American female owner of an MBE-certified professional services firm reported that she has done a lot of marketing. However, she noted that a barrier to advertising is that she does not have the money to market. [#29]
- The non-Hispanic white female owner of a WBE-certified professional services firm commented that you need a marketing machine in this business, and that the firm does not have that. She said, "If the state could say, 'We will help you market and with business development.' I would love for them to help us just get a website. We have a nice website, but it's not set up for mobile devices. I'd just really like help on how you promote business development. What are the keys? If the state could set that up, that would be phenomenal to have help with business development and marketing. To help us have a steadier flow of business and really grow." [#30]
- A Hispanic American male owner of a goods and services firm explained that they would love to be able to do repair work at Purdue, Ball State, or IU, but that they have their own mechanical contractors and engineers. Because of this, they would be marketing themselves to people who do not need their services. He also stated that it is a closed-network system, and if the universities needed any help, they would call their "buddies." [#33]
- The non-Hispanic white male representative of a majority-owned construction firm noted that proper advertising is a key to business success. He said, "Knowing how to get your name out there is important. How to make the phone ring or to get clicks. A good marketing strategy is something we have always worked on." He commented that they use the internet for marketing and have a good website. He noted that they do not use TV, radio, or print advertising as that can be very expensive. [#35]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm indicated that she is looking for more ways to market her firm. She noted that she has been to the airport a few times to market her company. She said that she has not received any business from them. [#36]

- A non-Hispanic white male owner of a construction firm reported, "I have [never] found a convention or show that we could go to that specifically markets our goods and services to the state. If it exists, I haven't found it. We have had a presence off and on in what they call the Indiana Show. It is the trade association that we all belong to. About every three years, we go up there and have a booth for ourselves. It is mostly for oil people. I seldom ever see any state or local people there. I have tried to find something to do with county or city municipalities along these lines, but I haven't found anything there, either." [#61]
- The non-Hispanic white male representative of a majority-owned construction firm reported that there are very few opportunities to market their firm. Because of this, they bid on appropriate jobs and let their reputation precede them. [#66]
- When asked about opportunities to market the firm, a Black American male owner of a non-certified professional services firm reported, "It's an issue ... We should put more into marketing. Our big issue is ... [being] able to communicate with the people who make purchasing decisions." He said that it is not very clear who those people are. [#67]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm reported that she never had to market the firm until 2011. Even though she now advertises in local magazines a couple of times per year, she has a very small budget to do so. She added that it is usually too expensive to advertise, and that a lot of business in her field is built by word-of-mouth and interpersonal connections. [#73]
- The non-Hispanic white male owner of a construction firm stated that most of the opportunities to market the firm happen through word-of-mouth and referrals. He said, "I've run ads on small radio." He reported that the company name and contact information are displayed on their equipment and said that he thought the rate of return on those investments was low. [#75]

Some businesses reported minimal challenges with marketing or no need to increase their marketing. [e.g., #28, #40, #50, #54, #63a, #71a, #72] For example:

- When asked about opportunities to market his firm to public agencies, a non-Hispanic white male owner of a construction firm pointed out that he has not needed to be a "PR machine" yet. He mentioned that he has been so busy just taking care of current business, that he has not needed to do it. He noted that he would like to do that in the future. [#18]
- Regarding opportunities to market his firm, a Hispanic American owner of a specialty contracting firm reported, "No. None. We're so word-of-mouth ... [Paid marketing has] never been useful. We've had ads ... There's no need ... That was an expense that wasn't even necessary." [#41]

Bonding requirements and obtaining bonds. Some contractors discussed how bonding is not an issue [e.g., #13, #34, #41, #43, #52, #66, #67, #72, #75]. Others discussed difficulty in bonding. For example:

- The non-Hispanic white male representative of a majority-owned goods and services firm commented that obtaining bonds can be a hindrance for a small business if they are relying on cash flow. A small business might walk away from a bid because they do not have the money to put out to get the bond for a bid. [#15]
- A non-Hispanic white male representative of a majority-owned professional services firm stated that they sometimes have to get bonding, and it can be difficult. He noted that he would like to get information upfront of a bid on what are the bonding requirements and where to go to get a bond. [#20]
- A Hispanic American male owner of a non-certified goods and services firm mentioned that bonding can be a barrier to some public works projects. He stated that if they bid on projects for a county, they need to have a bond, and a bond is expensive for a small company. The owner said, "We're not bonding. We're not that liquid." [#33]
- A Black American male owner of a non-certified specialty contracting firm indicated that he has heard that the bonding on some of the public sector contracts is so large that it is difficult to get the contract. [#40]
- The Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm stated that a lack of being able to get bonding, especially at higher amounts, is a barrier. She has had to turn away many projects because, even when she can get the bonding, the amount of the bond is often not high enough to qualify to do the projects. [#51]
- When asked about barriers to obtaining bonds for companies, a non-Hispanic white male representative of a majority-owned specialty contracting firm responded that there would only be a barrier if the firm did not have a good relationship with the lending institution. [#54]
- A Subcontinent Asian American male owner of a DBE- and MBE-certified professional services and construction firm stated that bonding is a challenge, and that they raised money from friends and family and paid 12 percent interest. This helped with meeting bonding requirements, but raising the money was no easy task. He said, "I could do so much more with capital. Our biggest issue is access to equity capital." [#74]
- The non-Hispanic white male owner of a construction company indicated that "bonding and licensing requirements are too difficult to obtain because of the recession and smaller companies are being affected." [AI#10]
- The non-Hispanic white male owner of a professional service firm indicated that bonding requirements were very strict. He stated that one of the barriers he faced was "the ability to bid multiple bonded projects. We have limited bonding limits." [AI#25]

Insurance requirements and obtaining insurance. The study team asked business owners and managers whether insurance requirements on public sector projects presented barriers to business success. As discussed above, some said that the cost of obtaining the levels of insurance

required by government agencies can be prohibitive for smaller, new firms. [e.g., #26, #28, #33, #48, #67, #72, #73] Additional comments include:

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female stated that insurance is required, and sometimes that requirement presents challenges, particularly in the DBE world because rates are higher for smaller firms. [#3a]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated that a barrier to bidding on public work is the liability insurance requirement. She felt that the contract is a template that is mainly appropriate for large construction projects. Those RFPs require $2 to $3 million in insurance coverage, which makes sense for a construction job with trucks, large equipment, and many employees. The coverage and amount required is not appropriate for her scope and type of work. [#5]
- A Hispanic American female owner of an MBE- and WBE-certified professional services firm mentioned that insurance requirements can be a barrier because of the cost and, if companies do not read the requirements in the RFP, they may not be prepared for the insurance requirements. [#7]
- A non-Hispanic white male veteran owner of a non-certified construction firm stated that another problem is the certificate of insurance. He said that he has to submit a certificate of insurance for each project. Because of this, he said, "It becomes harder to do business on state projects." [#10]
- The non-Hispanic white female owner of a WBE-certified professional services firm noted that insurance requirements can be a barrier to working with public agencies. She stated that for some institutions the insurance requirement can be prohibitive. [#30]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm said, "For public work, we have to hold $5 or $10 million for liability." He mentioned that doing work for IAA can be prohibitive because of bonding and insurance requirements. He said, "There are a lot of little projects at the Indianapolis Airport that we could bid on. But, it's not worth it for a $1,000 job when I have to double my insurance from $5 million to $10 million for one job ... Insurance is expensive." [#32]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm mentioned that insurance requirements can be a barrier, especially for large projects. This is especially true, she noted, when they don't get any work from it. She said, "Don't ask us to have this insurance if you're not going to give us even a small job." [#36]

Some interviewees did not see insurance as a barrier [e.g., #35, #54, #55, #62a, #63a, #65, #66, #71a, #74, #75] For example:

- The Black American male owner of a non-certified specialty contracting firm said that he does not think insurance is a barrier because "you [have] to have insurance, regardless." [#40]
- With respect to insurance requirements, a Hispanic American male owner of a specialty contracting firm reported, "We exceed anybody's requested amount." He went on to explain that every time he had to raise his coverage levels, he kept at a higher level, and commented that no one has had to ask his firm to raise their limits further. [#41]
- The Hispanic American male chair of an Indiana minority-focused business council reported that he does not believe insurance to be a barrier. He stated, "I think insurance is easier. I think people are more aware of that. They don't ask business coaches about this. They understand insurance." [#46]
- A non-Hispanic white male owner of a construction firm reported that insurance requirements have never been a barrier for his firm. [#61]

Prequalification requirements. Public agencies, including Indiana state agencies, sometimes require construction contractors to prequalify in order to bid or propose on government contracts.

Some interviewees from construction firms reported that prequalification presented a barrier to obtaining work, including with state agencies. For example:

- A non-Hispanic white male veteran owner of a VBE-certified professional services firm pointed out that a barrier to getting certified with INDOT is a firm needs to have done some of the actual projects to get certified but they have to be certified to get a contract for any of the jobs. He commented, "That makes it tough." [#32]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm indicated that prequalification has been difficult in some instances. [#57]
- The Subcontinent Asian American male owner of a goods and services firm stated that he has seen prequalification requirements to be an issue. He reported that larger universities will sometimes not order from small companies. [#58]
- A Subcontinent Asian American male owner of a DBE- and MBE-certified professional services and construction firm reported barriers related to prequalification requirements. He indicated that both he and his partner came from smaller companies, and that sometimes the requirements require them to have experience with larger projects. They do not have that experience. He stated, "We have lost several projects because they wanted higher qualified [contractors]." [#74]

However, some interviewees indicated that prequalification was not a barrier to pursuing public sector work. [e.g., #12, #40, #55, #59, #61, #62a, #65, #67, #69, #71a, #72, #75] Examples of those comments include the following:

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female reported that prequalification requirements are not a barrier to doing business. If a company cannot complete a prequalification, he said that he does not understand how that company would be in business. [#3a]
- The Black American male owner of an MBE-certified specialty services firm reported that he does not have problems with prequalification requirements. [#6]
- When asked about prequalification requirements, a Hispanic American male owner of a non-certified specialty contracting firm responded, "By the time we get involved, they have already heard of us." He added that others seem to know him by word-of-mouth, and that prequalification is not an issue. [#41]

Licensing and permits. Certain licenses, permits, and certifications are often required for both public and private sector projects. The study team discussed whether licenses, permits, and certifications presented barriers to doing business.

Many business owners and managers reported that obtaining licenses and permits was not a barrier to doing business. [e.g., #3a, #12, #32, #40, #41, #52, #53, #59, #61, #62a, #63a, #66, #69, #73, #75] Examples of those comments include the following:

- The non-Hispanic white male representative of a majority-owned professional services firm reported, "We have all the permits that we need," and he reported that there are no problems getting licensing or permits to do their work. He said, "We had a permit that expired, and the State of Indiana worked with us great and allowed us to keep working under the old permit while we got the new one." [#11]
- When asked about licensing and permits being a barrier, a Black American male owner of a professional services firm reported that they are licensed in all states in which they work, but noted it is a "hassle." He added, "We deal with it. It's the cost of doing business." [#67]
- A Native American owner of a non-certified construction firm stated, "Indiana has the easiest contracting licensing I have ever seen in my life ... my dog could be a contractor. In Florida, it takes $6,000 and 40 hours of classroom. Here, it takes $200 and an afternoon." [#71a]

Some business owners said that obtaining licensing or permits can be a barrier. Interviewees explained barriers presented by different types of licensing or permitting:

- The non-Hispanic white male representative of a majority-owned professional services firm reported that different states have different requirements to be certified for that state, which presents difficulties. [#17]

- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm noted there have been issues with permits. He stated, "[With] permits, it just depends, based on who you have to deal with in the state." He went on to say that the Department of Natural Resources and the Occupational Safety and Health Administration take a long time when issuing certifications. [#57]

Size of contracts. Interviewees had a range of comments as to whether the size of contracts presented a barrier to bidding.

Some interviewees reported that the size of contracts could present a barrier. [e.g., #21, #23, #24, #28, #30, #33, #34, #40, #71a] Some interviewees connected barriers related to contract size to other barriers including favorable pricing, bonding, or access to capital. For example:

- The Black American female owner of an MBE- and WBE-certified professional services firm said that the size of a contract can be a challenge along with the pricing. [#2]
- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female reported that the size of the contract could be a barrier because of capitalization. For example, the firm might not have enough money to fund payroll for six months. He added that new small firms might find the size of contracts to be a barrier if they are not able to afford bonding. [#3a]
- A Hispanic American male owner of a professional services firm reported that contract sizes can sometimes be a barrier for his business. He recalled having to turn down a contract because it was too large for his firm to handle. He added that if it had been acceptable to the client, he would have hired subcontractors. However, he explained that some clients do not want subcontractors in their offices. [#43]
- A non-Hispanic white female representative of a majority-owned specialty contracting firm reported that the firm has limits on the sizes of contracts it will take. Because they had a few less profitable years, they do not have as much capital in the bank to work with. That has made it difficult to get bonds for larger contracts. [#44]
- When asked about size of contracts being a barrier, the Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm commented that the larger the size of the contract, the higher the amount necessary to bond. Her company cannot do bigger contracts because of the required high-dollar bonds, but she indicated that her firm could otherwise do the work. [#51]
- A Black American co-owner of an MBE-certified specialty contracting firm commented that cash flow for buying materials becomes a problem if the job is over $1 million. [#63b]

Some businesses reported that the size of contracts was not an issue. [e.g., #7, #20, #25, #27, #32] Some pointed to financing; subcontracting and other partnering relationships; and the ability to staff up or rent needed equipment in order to handle large contracts. For example:

- A Subcontinent Asian American female owner of an MBE-certified goods and services firm commented that size of contract would not be a barrier now since they have financing support from their bank. [#36]
- The Black American male owner of a professional services firm reported that he can work on most any size of contract, and, if needed, he can get help from his network or business partners. [#37]
- A Hispanic American male owner of a non-certified specialty contracting firm reported that the size of contracts has never been an issue for his firm. He commented, "I've never turned down any work." He also added that he can hire subcontractors if necessary. [#41]
- The representative of a professional services firm owned by a Subcontinent Asian American male reported that contract sizes are not a barrier for the firm. He also commented that the firm can pursue larger contracts by hiring subcontractors. [#42]
- A non-Hispanic white female owner of a WBE- and DBE-certified construction firm reported that her company can work on almost any size contract. She added that if they need to ramp up, they can pull employees from the union hall and rent equipment. [#55]
- The Black American male owner of a professional services firm stated, "We don't have a problem with that [the size of contracts]." He explained that his firm will partner with another firm as a joint-venture, and that allows them to do larger contracts. [#67]

Any unnecessarily restrictive contract specifications. The study team asked business owners and managers if contract specifications presented a barrier to bidding, particularly on public sector contracts.

Many owners and managers indicated that some specifications are overly restrictive and present barriers. It appears that some businesses choose not to bid due to what business owners and managers perceive to be overly restrictive contract requirements. [e.g., #38, #49, #50, #74] Examples of interviewee comments include the following:

- The non-Hispanic white male representative of a majority-owned professional services firm indicated that unnecessarily restrictive contract specifications are often an issue. He explained that he typically sees standard contract language from other clients, but when he goes to the State of Indiana, "They pull out their own form of contract ... they come back to us and say 'sign here.'" He added, "It has been a continuous problem. The insurance industry and the government industries don't agree on what liability is and how to secure it. So we're left in the middle sometimes when we sign contracts." [#17]

- The white male representative of an Indiana small business development center reported that he has not heard of any specific instances of restrictive contract specifications. He stated, "I think that would vary from business to business because what might be cumbersome to one might not be to another. I think it depends on bandwidth, as well." [#47]
- The Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm reported that she has encountered unnecessarily restrictive contract specifications, primarily in the private sector and not the public sector. She explained that a private sector customer can cite the contract specifications, and that would give a customer a lot of flexibility and subjectivity to exclude a prime contractor or subcontractors. She added, "[Those] contract requirements are oppressive." [#51]
- A non-Hispanic white male representative of a majority-owned specialty contracting firm explained that he sees unnecessarily restrictive contract specifications more in the private sector than in the public sector. He added that there are a lot of owners that require specifications that are difficult to meet. [#54]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm stated that he has seen some restrictive contract specifications. "The restrictive stuff I've seen, I think, is mainly so they can get the contractor in [that] they want. [The] last time I [saw] restrictions on stuff, [they] really didn't even apply to the job we were trying to do, but they were in the specs." He stated that this has kept him from bidding on jobs. [#57]
- The Subcontinent Asian American male owner of a goods and services firm stated that restrictive contract specifications can be a problem on a national level, and that the cost of a legal review of a contract with many requirements or specifications could exceed the profit. [#58]
- The non-Hispanic white male representative of a majority-owned construction firm indicated that restrictive contract specifications can be a problem. He reported, "Many times, the contract has something that is one-sided. For example, most have a 'no damage for delay' clause. This creates problems for us. An eight-month delay will cause a problem." [#66]
- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female reported that restrictive contract specifications are not usually a barrier for his company, but that this could be a barrier if the company does not have the credit to provide the specified material required. A smaller company might not have the credit available with suppliers, depending on the contract specifications for the project. [#3a]

Some businesses reported no barriers resulting from restrictive specifications. [e.g., #11, #12, #13, #41, #65, #67, #75] For example:

- The Black American male owner of an MBE-certified specialty services firm reported that he does not have any problems with restrictive contract specifications. [#6]

- When asked about his experiences with restrictive contract specifications, a non-Hispanic white male owner of a construction firm replied, "Not in Indiana." [#61]

Prevailing wage, project labor agreements, or any requirements to use union workers. Contractors discussed prevailing wage requirements that government agencies place on certain public contracts. They also discussed other wage-related issues.

Many business owners and representatives indicated that prevailing wage requirements present a barrier to working on public contracts. [e.g., #8, #17] Examples of interviewee comments include:

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female commented that prevailing wage requirements could be a barrier for small businesses. [#3a]
- The non-Hispanic white male representative of a majority-owned construction firm reported that prevailing wage does cause a problem and can be a barrier to his firm. He said, "It causes a problem in two ways. First of all, it's tough to bid that out because we're not use to bidding prevailing wage. We're non-union. Then, you have that anyone on the site is paid prevailing wage. So, it becomes an administrative hassle, almost a nightmare at times." [#35]
- The Black American male owner of a specialty contracting firm reported that prevailing wage requirements "could be [a barrier], and that is part of the reason why I haven't ventured out to try to get some big stuff." He explained that whether or not he uses union help would be dependent on the contract. [#40]
- When asked about prevailing wage requirements, a non-Hispanic white male owner of a construction firm responded, "I hate them. We need to do away with that whole scenario completely." [#61]
- The non-Hispanic white male representative of a majority-owned construction firm stated that they have yet to have issues with prevailing wage. He added, "However, as of July 1, 2015, the State of Indiana repealed the Common Construction Act. This will hurt our competitiveness sooner or later." [#66]
- When asking about prevailing wage requirements, a non-Hispanic white male representative of a majority-owned professional services firm stated, "It is tough." He added that while his firm pays well and provides full benefits, they do not always meet prevailing wage. He added that when they see prevailing wage in a bid, they call and ask what it is, and then decide if they will bid or not. [#72]
- The non-Hispanic white male owner of specialty contracting firm indicated that the prevailing wage clause made it difficult to secure contracts and gain business. He stated that he was invited to participate in the bidding process, but when the contracting agency found out his firm was not union, he was denied the opportunity to bid. [AI#3]
- The non-Hispanic white male owner of a concrete firm indicated that because his company is not union, union laborers often try to shut down bid opportunities or

jobs he would like to take on. He has also experienced union laborers causing trouble and disturbance with his ability to complete work. [AI#8]

Several firms said that complying with prevailing wage requirements was not a barrier when working on public projects. [e.g., #11, #13, #32, #34, #42, #51, #55, #58, #62a, #65, #67, #69, #74] For example:

- A non-Hispanic white male veteran owner of a construction firm stated that is firm is a union company, and that he has lost some projects because of that. He said that prevailing wage requirements are not a barrier to his business. [#10]
- A Subcontinent Asian American male owner of an MBE- and SBE-certified construction firm indicated his business is a union shop. He has worked with non-union contractors on some of the jobs, and there has never been a problem. [#12]
- A Hispanic American male owner of a non-certified goods and services firm stated that prevailing wage requirements were not a barrier for his business. However, he also noted that there are a lot of wage categories, and it was difficult to find out which one they fell into. [#33]
- A Hispanic American male owner of a non-certified professional services firm reported that prevailing wage requirements are easier to deal with when the jobs are with state or federal agencies. He added that the cost is already anticipated in the contract, and that the client knows the cost will be passed along. [#43]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm said that most state and federal government projects require prevailing wage, which is not an issue for him. He commented, "We just pay all the benefits out as wages." [#57]

Bidding processes. Interviewees shared a number of comments about bidding processes.

Many business owners said that procedures for bidding and proposing presented a barrier to obtaining work and put larger firms at an advantage. [e.g., #24, #33, #57, #64, #71a, #73] Many interviewees mentioned the time involved in preparing a bid or proposal puts small companies at a disadvantage. A number of business owners pointed to the paperwork involved, especially for public sector contracts.

- A Hispanic American female owner of an MBE- and WBE-certified professional services firm expressed that most small businesses do not have the time to do all the research on RFPs. She added that it is tough to respond to RFPs. and it is time-consuming. She reported, "We average around 200 hours on a RFP. That's non-paid, key people working on our team. I think it's a time drain. It's detailed-oriented." [#7]
- The non-Hispanic white male representative of a majority-owned goods and services firm explained that an agency could have people coming in from other cities to bid on the job and could have "ten or 12 different people bidding on the same project." He said that is why "the small guys walk away from some of these

[projects]." He added that a smaller company does not have as many resources to put into a bid when the chances of getting the work are small because of the number of other bidders. [#15]

The same representative also commented that he does not understand thresholds requiring competitive bidding for public agencies. He explained that he has seen $50,000 jobs given without a formal bid process. He said that in cases. where a bid is not required for a public sector project, having a CAGE number or a VIN number established makes it much easier for the vendor to take an order from a customer without waiting for their paperwork to be filed. He explained that a small company that does not have those numbers established would miss those order opportunities. [#15]

- The non-Hispanic white female owner of a WBE-certified professional services firm indicated that the bidding process can be very costly. She stated that it is costly in time and resources. She said, "If I prepare a proposal for you, and we don't get the job, I've just spent three to four weeks on it. I and my staff members could have been working on another job and getting paid. That's where it can come back against you." [#30]
- A Subcontinent Asian American male owner of an MBE-certified professional services firm reported that bid development is a barrier in pursuing private sector and public sector work. He added that it is more difficult in the public sector because of the time and resources needed to go through the RFP processes, and that the other processes associated with getting public sector work "consumes a lot of resources." [#49]
- The non-Hispanic white male owner of a professional services firm indicated that the process of bidding engenders the need for extensive financial support. He stated that, "Bidding work for the state is made difficult because of the capital investment involved. Paying out large sums to have special financial audits and paperwork completed to even qualify to bid can be difficult for smaller businesses trying to expand." [AI#29]
- The female owner of a DBE- and MBE-certified goods and services firm commented, "We have been looking for and bidding on state opportunities for ten years, and up until recently, we have only been awarded two, and they have been extremely small." The same business owner added, "Even though we are awarded the contract, it states it in the verbiage that they are not obligated to purchase those items ... that we were awarded the contract for. So, what's the point?" [PF#11]
- A female representative of a MBE- and WBE-certified specialty contracting business reported that large firms are at an advantage when bidding work with public agencies. She saw no avenue for small firms to negotiate their bids when competing against larger firms that bid lower. The same representative explained, "Disparity will continue to exist if those that write the contracts do not work at contracting with the small business ... Relationship-building does not progress if only one side is making all out efforts to cultivate it and [the] other side readily invites you to the party but makes minimal/cursory effort[s] to engage you. [WT#1]

- The Black American female owner of an MBE- and WBE-certified professional services firm reported, "It's all a barrier—access to information, clarity ... RFPs are so horribly constructed, and then they ask the same question multiple times." She commented, "Getting an answer [on RFPs] is so difficult." She also said that in asking for clarifications, "you don't want to be perceived as a troublemaker." [#2]
- A Hispanic American male owner of a professional services firm stated that the bidding process is the "worst thing there is." He added that it is a barrier because he does not always have enough information to submit a bid that will be accepted. He further explained that often, he is not sure how to bid a job in terms of price because the information he needs is missing. [#38]
- The non-Hispanic white female owner of a WBE-certified professional services firm reported that some of the bid documents are 30 pages. She added, "It's almost like you have to be an attorney to fill out some of the bid forms." [#56]
- A non-Hispanic white female owner of a WBE-certified construction firm indicated challenges when the bidding process considers bids that do not follow contract specifications. She commented, "Are [our] bids too high because we follow the specification, or are bids too high because, well, they're just too high? More than not, we have followed the specifications, and the contractor who is looking for that bid is not following the architect's specifications." [PF#10]

Amount of "paperwork" presents burdens to small firms. Some interviewees commented that the amount of Indiana state agencies and other public agencies' paperwork presented a barrier to their firms.

- A Hispanic American male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female reported that minority-owned firms sometimes have a difficult time processing all of the paperwork. [#3b]
- A non-Hispanic white male representative of a majority-owned professional services firm stated that sometimes the paperwork on public jobs is a barrier. He said, "In the bidding, a lot of times they ask for things that don't even apply to us ... They apply more to manufacturing companies... It makes it a little tough." [#20]
- When asked about the bidding process, a non-Hispanic white male owner of a construction firm indicated that the process can be restrictive when additional items and paperwork are required. He stated, "I understand them needing to know what you do and who you are, but I would think that if you have 20 years of business, then that would be a good enough reference point rather than having to put together a four to ten page resume to send with a bid." [#61]
- A Hispanic American male owner of a non-certified specialty contracting firm reported, "I haven't followed through on any opportunities presented by the state because we're too busy doing the work now." He added that he reads through some of them, but is slow to complete the paperwork for bid packets. [#41]

- The non-Hispanic white male owner of an electrical contracting firm indicated that it was difficult to pursue public work because "the state makes it difficult to maintain all the proper paperwork and then also the wait for pay." [AI#18]
- The non-Hispanic white male owner of a goods and service firm indicated that the paperwork needed for bidding was too cumbersome. He stated, "[Contracting agencies need to] supervise the bidding paperwork. It's way too much paperwork to fill out for the bids, so I just don't even fill it out." [AI#23]

Short deadlines to submit a bid. Some interviewees reported very short bidding deadlines on some projects, including some public sector contracts.

- A non-Hispanic white male representative of a majority-owned professional services firm commented that the only barrier to the bidding process for his company is that there is often not enough time to complete the bid. He added that they have had to turn some bids down because of the short amount of time to complete. [#72]
- A non-Hispanic white female owner of a WBE-certified construction firm commented, "The other issue that seems to come up a lot is the shortness of the time frame that we're allowed to bid. When you talk about the disparity on whether we've been awarded a project or not, some of that questioning needs to be, 'When were we approached to bid that project?'" [PF#10]

  The same business owner added, "For instance, I was sent an invitation to bid for [a project] at Indiana University ... I was sent an invitation to bid on ... January the 13th at 3:30 in the afternoon. That project was just a large project. That bid date was January the 15th at 2:00 p.m., so I was given ... basically two days to put a bid together ... To me, that's an issue." [PF#10]

Non-price factors public agencies or others use to make contract awards. Public agencies select firms for most professional services contracts and some other contracts based on qualifications and other non-price factors. Sometimes factors that might not be legitimate are used, according to interviewees. Comments on this topic include:

- A Black American female owner of an MBE- and WBE-certified professional services firm stated, "I [submitted] four RFPs last year, and I came in second on all of them. It's always gone to a major [corporate] competitor. I know for a fact that the work we do is competitive with larger entities in the city. I know it for a fact ... It's like an old shoe. I'm like a new shoe, and you're trying me on for fit, you like it, it looks really good, you know it would probably be a perfect fit." [#2]

  The same business owner also said, "Another barrier to success is the opportunities coming our way, but people are scared to take a risk on a smaller, not-as-developed company." [#2]
- The Subcontinent Asian American male owner of a goods and services firm reported that in terms of the bidding process, the small size of the company is an impediment to getting a bid, even though the firm's prices are often 40 percent

lower than a larger competitor's prices are and the quality of goods is excellent. He explained that in his industry, the universities have longstanding relationships with large suppliers and are willing to pay and protect the prestige of those suppliers. They do not want to work with a small business, even when it saves them a lot of money. [#58]

- The representative of a professional services firm reported that he has been told by public agencies that he is too small, too far, and does not have enough experience. He has spoken with other companies that do the same type of work as him, and indicated that they are not willing to subcontract public sector work to him. He commented, "[Those] people beat the system somehow." [PF#5]
- The Black American male owner of a non-certified construction company indicated that company size is often a barrier in obtaining work. He stated, "Smaller companies have problems with getting contracts or good bids because [selection agencies] think they lack experience." [AI#5]
- The non-Hispanic white female owner of a WBE-certified professional services firm reported that a potential barrier is when there is an incumbent vendor for an RFP project and the agency is happy with them and their work. She said the agency is only going out for bid because they have to or are required to every so many years. In this case, she felt that the bidding process was a "done deal." The incumbent is going to win, and the agency wants them to win. In cases like this, she she said that the agency should let bidders know so they do not spend time and money on the bid. [#5]
- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners reported that the "Buy Indiana" initiative should be encouraged. She added that some of her members have been discouraged after they bid on a project and a company from outside of the state gets the job. [#45]
- The non-Hispanic white male representative of an Indiana small business development center discussed some of the challenges for businesses during the bidding process. He stated, "Transparency, interacting with the companies that are bidding out the project ... a lot of it has to do with location of the businesses within the state. So, if it is an Indy job, and you are a Northwest Indiana or Northeast Indiana company bidding on that project, and you see central Indiana companies win those bids over and over again, that's where transparency comes into it." [#47]
- A Subcontinent Asian American male owner of an MBE-certified professional services firm reported that sometimes the bid requires companies to have had three prime contract jobs. He went on to say that this is not easy for small, disadvantaged businesses. [#49]
- A non-Hispanic white female owner of a WBE- and DBE-certified construction firm explained that for many bids, a company has to submit financials, and sometimes the less established companies do not get awarded the contract based on that. [#55]

- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm reported that he has seen factors unrelated to price be considered on public projects. He stated, "They look at sometimes how long you've been in business. That will even be a stipulation where they say they want you to have 'X' amount of experience doing this job." [#57]
- When asked about non-price factors that public agencies use to make awards, a Black American female owner of an MBE- and WBE-certified professional services firm stated, "If you don't have an office in Indianapolis or have the visibility, no matter how many databases or certifications you have, it just doesn't work." [#65]
- When asked about non-price factors as a barrier, a Black American male owner of a professional services firm reported, "[it is] hard to say." He explained one time he was forced to use a certain company that had been used in the past, or they would not be awarded a particular contract from a public agency. [#67]
- When asked about non-price factors, the non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated that she thinks her company is seen as too small to be taken seriously. [#73]
- Regarding non-price factors, the non-Hispanic white male owner of a contracting firm stated, "It seems a lot of ways things go down is friends-of-friends [and] relatives, when somebody's brother gets a job." [#75]
- The non-Hispanic white female owner of a non-certified professional services firm felt that selection agencies intentionally give more information to the firm they want to select. She stated, "The greatest obstacle that we've experienced is the fact that the incumbent always has more information [or] details, which are not shared with other firms pursuing the business. The point system seems to favor the incumbent which makes it all but impossible." [AI#14]

Timely payment by the agency or prime contractor. Slow payment or non-payment by the customer or prime contractor was often mentioned by interviewees as a barrier to success in both public and private sector work.

Many interviewees said that slow payment can be damaging to companies. Interviewees reported that payment issues may have a greater effect on small or poorly-capitalized businesses. [e.g., #7, #8, #24, #25, #35, #38, #42, #48, #49, #51, #54, #71a, #73] Examples of interviewee comments include:

- The non-Hispanic white male representative of a DBE-certified construction firm reported that timely payment by the agency is a big issue in public contracting. When a small company is struggling for capitalization, getting paid sooner helps bridge that gap. [#3]
- The Black American male owner of an MBE-certified specialty services firm reported that timely payments are a problem with contractors on both public and private projects. He said that owners need to do more and could help in this by employing a payment policy that required prime contractors to pay all their

subcontractors and suppliers within two weeks of being paid. He added, "And then enforce it. That will clear it up." [#6]

- A non-Hispanic white male veteran owner of a non-certified construction firm stated that untimely payments can be a problem, because as a subcontractor, they are the "tail of the dog" and last to get paid. He indicated that the payment time will vary by the general contractor, the size of the project, and the owner. He said, "If I get my money in 45 days, I'm happy. But 60 days is usually the norm." [#10]
- The non-Hispanic white female owner of a WBE-certified professional services firm noted that timely payment can be a problem for her business, especially with local agencies. She said that sometimes with local agencies, it can be three months out before you are paid. [#30]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm noted that timely payments can be a problem in the public sector, and that it would prevent them from going after a large job. She gave an example of slow payment from the City of Indianapolis. She explained that because of this, if she had a job with the City of Indianapolis for a large amount, she couldn't finance that large amount of money. She said, "So that is where the small business is at a disadvantage due to cash flow." She pointed out that even a 45-day lag time in payment could be a barrier. [#36]
- When asked about timely payment, a Hispanic American owner of a specialty contracting firm reported, "Oh, gosh, that's horrible. That's a terrible one. I can go a year [to] a year-and-a-half before I receive some payments." [#41]
- When asked about timely payment by an agency or prime, the non-Hispanic white female representative of a majority-owned professional services firm stated, "We have a lot of problems getting payment." She also commented that the county government is restricted to a monthly budget, and that her firm will sometimes extend the payments into future months if the client cannot fully pay in one month. She went on to comment, "Because we are so small, some people think they can take six to nine months before they have to pay anything." [#70]
- A non-Hispanic white male owner of a construction firm pointed out that he is having some problems with timely payment from a state university. He commented, "No money. Not getting paid as a sub. From what I'm told the general contractor hasn't been paid. The first payout was in April, and it's now July. As a small contractor, that's tough ... I'm completely done with the project, and I've not received one penny." He added that the payments with another state university have been fine. [#18]
- A non-Hispanic white male representative of a majority-owned professional services firm reported that he used to do work for INDOT. He stated that sometimes getting money out of INDOT was like pulling teeth. He said that invoices would get lost in the INDOT system and no one would know where they were. He noted that there was no accountability. [#20]

- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners reported that non-timely payments could be an issue for their members on public projects because the payment schedule is generally 90 days. She added that businesses need to be aware of the payment schedule and be sure that they can handle it. She noted that some of her members do not bid on public projects, because they are afraid of this longer payment schedule. [#45]
- On the topic of timely payment by the agency or prime, the non-Hispanic white female representative of a trade organization stated, "That is a big factor if you are a small company. It is a barrier if it is not timely." She also reported that the businesses must pay employees and suppliers on a 30-day schedule even though the agencies pay on a 90-day schedule. She indicated that cash flow could be an issue. [#50]
- The Black American male owner of a non-certified construction firm indicated that it is difficult to take on larger jobs as a small company because delayed payments are a burden. He stated, "You literally have to have startup money, the payroll is normally at state level, and [you have] to carry materials [costs] for 60 days before [you can] get paid." [AI#7]

Many firms that work as subcontractors commented on delayed payments by prime contractors. A few of the comments are noted below:

- When asked about timely payments, a Black American female owner of an MBE- and WBE-certified professional services firm reported that government contracts often have a 60- to 90-day pay window. This can cause issues for small companies who have to float payroll for that long. "We put provisions in our contracts [with prime contractors] for not paying in a timely manner. But, they came back and said if they were going to pay us earlier, they were going to take a percentage. It's like it is always a give to the prime. Whether they pay you early, or whether they don't pay you, you're still giving." [#65]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm said, "A lot of [prime contractors] will give you a contract, and it says you get paid when they get paid by the owner, but that doesn't always work ... If the general does something to hold up the pay from the owner, and it has nothing to do with what I did, I shouldn't be penalized waiting on my money." [#57]

Some interviewees said that they typically do not have difficulty getting paid on public sector contracts. [e.g., #5, #17, #33] For example:

- When asked about timely payments, a Subcontinent Asian American owner of an MBE- and SBE-certified construction firm reported he has never had any problems. He stated, "Generally, no, I never have any issues. Everyone I work with has been good. There was one contractor from Indianapolis that was kind of late and therefore made me late with my suppliers. I've always been paid. Now, having said that, I have had a couple of times where I've been stiffed by customers." [#12]

- A non-Hispanic white male veteran owner of a VBE-certified professional services firm reported that timely payments from state agencies have not been a problem for his business. [#32]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm stated that the state and the federal government pay in a timely manner. [#57]

Recommendations for improving state agencies' or public colleges' bidding and other processes. A number of business representatives and business owners commented on or made suggestions for improving other Indiana state agency procedures. Many discussed a need for streamlining state agency processes. For example:

- A Black American female owner of an MBE- and WBE-certified professional services firm explained that she competed for but did not win a contract, and someone from IDOA offered to help her set up a debriefing meeting. When discussing the meeting, she said, "Oh my goodness. You would have thought I was the biggest inconvenience when the meeting took place. The people in the meeting didn't know why they were there, didn't understand why I had questions ... I demanded a second meeting." In that follow-up meeting, "I could see where in some areas my responses were stronger, and I could see where theirs were stronger, and it all made total sense, perfect sense. I would pick them too." She continued, "This is what makes it hard ... there isn't anyone there to help you." [#2]

  The same interviewee also added, "When I go to information meetings at the state, the people from the state look like they don't want to be there. I think they could be more helpful, more engaging. [State staff] just don't look like they want to be in the room giving information." [#2]
- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female reported that the state and federal level need to ensure companies are paid sooner than they currently get paid. State and federal agencies are notorious for not making payments for 45 to 60 days. [#3a]
- The non-Hispanic white female owner of a WBE-certified professional services firm reported that a problem with bidding on public RFPs is that the awarding agency does not get back to the bidders with information on their bid or the winning bids. She indicated that makes her not want to bid on public projects. [#5]

  The same business owner went on to indicate that the agencies should focus the RFP on the scope and type of project. For example, she said that one of the biggest barriers is the $2 to $3 million insurance for all projects, and the requirement to have that coverage when you bid. She noted that that is a problem because you are paying for it, and you don't even know if you have the job or need it. Then, if she loses the bid, she is out all that money. She reported that she is hearing that a lot from other WBEs. She said, "The agencies are not taking the time to tweak their RFPs for the specific project. The RFPs have pages of stuff that don't apply to what she would be doing." [#5]

- Regarding other business assistance, the non-Hispanic white male representative of a majority-owned professional services firm stated, "The thing that states should do with small businesses is pay them immediately. Cash flow is an issue for small businesses .... The State should pay them in two to three weeks instead of 60 days. That would be a significant change." [#17]
- A Black American owner of an MBE-certified goods and services business reported that public agencies could improve their process by having a grant program for minority-owned businesses to assist with financing. [#27]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm pointed out that it would be good if the state could level the playing field. He stated that the current set-asides are outdated. He noted that sometimes they do all the work and get 3 percent, and an MBE prime is just checking their work and getting 7 percent. He said, "The MBE prime got paid more to proof my work than I got paid to get the work done ... this may be a reason that state projects run over budget." [#32]
- When asked about recommendations to improve the bidding process, the non-Hispanic white male representative of a majority-owned construction firm stated, "The easiest they can make the process, the better it is for small businesses." [#35]
- A Black American owner of a specialty contracting firm commented that rather than giving the large jobs to a single, larger contractor, the public sector should focus on breaking up those jobs to give small or minority-owned firms startup and revenue opportunities. [#40]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm stated, "One thing I think they could do is, on big jobs, break them down a little more. Break the jobs down so the small guy can go in and bid as a prime for a small piece of the job instead of the whole job." [#57]
- A Hispanic American owner of a professional services firm recommended that the state use one regional point of contact for contracts related to his discipline. [#43]
- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners indicated that there is an opportunity for growth and improvement in the state agencies and public colleges' bidding process. She stated, "We need to look for more collaboration and more awareness to what their needs are. [#45]
- A Black American male owner of an MBE- and DBE-certified specialty contracting firm commented that he sees companies with more than 60 trucks getting work from the state as an MBE. He suggested that there be a cap on the size of firms so that smaller MBE firms that are just starting out can get more work. [#48]
- The non-Hispanic white female representative of a trade organization commented that the state should offer more education about the process. She noted that the state offers webinars and workshops, but much of that is only offered to businesses that are certified as disadvantaged businesses. She reported that this information should be available to all companies. In her region, there are not many certified

businesses. She stated, "You can search our ZIP code and see... I know there [are] a lot more woman-owned businesses, but they're not certified ... It's not that they're not trying." [#50]

- A non-Hispanic white female owner of a WBE-certified professional services firm reported that the largest barriers to her business are the "lack of knowledge of how to navigate the system ... what is available ... what are the opportunities ... where do I go look ... where do I find out ... [and] how frequently do they become available?" She indicated that she was trying to learn how to do business with government and how to reach public agencies to do business with them. [#52]

  The same business owner recommended tutorials or online information to help build business knowledge and information about processes for how to access public agencies and opportunities at those agencies, as well as virtual support so that she could get links sent to her with helpful information. [#52]

- The Black American male co-owner of an MBE-certified specialty contracting firm recommended that state agencies make it easier for firms to find out about jobs. He said it would be easier if opportunities were clearly posted on the government website. He added that he currently uses a third-party vendor to find opportunities.[#63b]

- When asked about recommendations for improving the bidding process, the non-Hispanic white male representative of a majority-owned construction firm commented, "It would be helpful sometimes to have more time to complete documents. The bids force the design team to choose a date. The design team doesn't always have it done, so the potential bidders get incomplete documents to try to bid from. Then, they get last-minute addendums. This creates problems to do a thorough bid." [#66]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated that she learns about opportunities when RFQs are released. She added that she would like to have more convenient ways of finding out about opportunities. [#73]

- The non-Hispanic white male owner of a construction firm stated that dealing with red tape is the biggest issue. He said, "There should be somebody always to take a phone call to help answer your questions." He commented that he is tired of all the anonymous ways to do your business. He added, "I call, and then they refer me to the website and the page is expired ... We can never talk to anybody anymore. We are not getting anything done." [#75]

- The non-Hispanic white male owner of a professional service company indicated that state agencies need to provide more communication. He stated that information is "not communicated in a timely or consistent format" when he is working on a proposal. The high turnover rate at the agency also makes it difficult to "keep track of decision makers to secure contracts." [AI#12]

- The non-Hispanic white male owner of a goods and service firm indicated that state and public agencies need to be more available to give out information. He stated,

"When I call the state, it's like the communication is pathetic. With the colleges, the communication is also pathetic." [AI#16]

- Regarding INDOT's communication, the female owner of a DBE- and MBE-certified goods and services firm commented, "Lack of communication. Again, we're a small company. We spend a lot of time and a lot of effort trying to find this data, get people to return our calls, and it goes to deaf ears. So, that's extremely frustrating." [PF#11]

Any additional disadvantages or barriers associated with being a minority- or woman-owned small business. Some interviewees reported additional disadvantages or barriers for minority- and woman-owned small businesses. Comments from the in-depth interviews include:

- A Black American female owner of an MBE-certified professional services firm indicated that the main reason she has some problems is that she is a minority. She said, "I'm simply black. It's a little harder to get a customer, get the same bill rates and get the same treatment as the other majority-owned ... firms .... That's why I'm saying I can't get what they get, because I'm a black minority." [#29]

  She noted that other cities might be more favorable to Black American-owned firms because there are more Black American people in that city or more Black American business owners. She said, "Here, we're the only minority [specific firm type] in [this City]. There are [firms of the same type] run by blacks, but they don't own them." [#29]

- The Hispanic American chair of an Indiana minority-focused business council reported, "The market is a tough one for anyone. Minorities need education on tools that can help them. There are a lot of businesses that don't know [that] the tools exist to help them and other services that are available." [#46]

F. Indiana State Agencies and Public Colleges

The study team asked interviewees to describe experiences attempting to get work with state agencies and public colleges in Indiana. Topics included:

- Experiences working with public agencies and colleges *(page 102)*;
- Difficulty finding out about opportunities *(page 103)*;
- Bidding process relative to other public agencies and colleges *(page 105)*;
- Prequalification *(page 106)*;
- Receiving payment (relative to other public sector work) *(page 106)*; and
- Recommendations *(page 107)*.

Overview of experiences working with public agencies and colleges. Many of the firms interviewed had been successful obtaining work with the participating entities. [e.g., #17, #19, #20, #30, #32, #33, #36, #41, #44, #54, #55, #57, #58, #66,] Many of those interviewees had favorable comments about working with those agencies. Another large portion of interviewees

had experience with one or just a few of the participating entities. [e.g., #48, #49, #52, #59, #61. #64, #65, #71a, #72, #73, #75] For example, the non-Hispanic white female representative of a majority-owned professional services firm reported that the only state agency that her firm has worked for is INDOT, and that their payment was made very fast when compared to county agencies that they have done business with. [#70]

Difficulty finding out about opportunities. Interviewees discussed whether it was more or less difficult to find out about bidding opportunities for the participating entities.

Many firms reported that it was relatively easy to find out about bid opportunities with the participating entities. A few of the comments are noted below:

- The non-Hispanic white female owner of a WBE-certified goods and services firm indicated that there is no real difference in finding opportunities between private and public colleges. She said that her business is usually contacted directly by the organization that wants her firm's service. [#1]
- Regarding working for public agencies, a non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female reported that public sector opportunities are easy to find, but there are many restrictions on bidding. [#3b]
- A non-Hispanic white male representative of a majority-owned professional services firm reported that they learned about Ivy Tech Community College (Ivy Tech) jobs via word-of-mouth. [#20]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm explained that finding out about opportunities for INDOT and Indiana public universities was easy. He said that he went to the websites or bidding pages and spent time looking for jobs that could apply to his firm. [#32]
- A Hispanic American owner of a goods and services firm stated that they receive fax requests for bids from Indiana State University (ISU). [#33]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm noted that Indiana University-Purdue University Indianapolis (IUPUI) contacted her after finding her firm through an internet search. [#36]
- A Hispanic American male owner of a professional services firm stated that it was easy for him to find out about the opportunities so far because they were word-of-mouth, and he did not have to look for the opportunities or go through any bid processes. [#38]
- The Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm reported that she thought it was easier to find out about opportunities because her company has built relationships with general contractors, and the general contractors notify them. [#51]
- When asked about opportunities, a non-Hispanic white male representative of a majority-owned specialty contracting firm stated that it is very easy to find out

about opportunities. He explained that the state sends out emails to anyone who signs up, and agencies post jobs on their websites. He added that IAA holds a public meeting. He also reported that it is easy to find out about opportunities with colleges. He indicated that anyone who has a relationship with the colleges offering work will receive an invitation to bid when there is an applicable job. [#54]

Some interviewees experienced difficulties learning about bid opportunities with the participating entities. [e.g., #41, #48, #52] Their comments included the following:

- The Black American male owner of an MBE-certified specialty services firm reported that he has worked with many state agencies and universities. He said that the "good ol' boy" network is alive and well. For example, he said that ISU may have a project, and the university has been working with a vendor or supplier for years. Then, ISU is likely going to use that vendor or supplier. He reported that the president of the university is responsible for setting the appropriate tone for contracting. He said that as it stands now, that tone encourages the existence of the "good ol' boy" network. [#6]
- A Hispanic American female owner of an MBE- and WBE-certified professional services firm reported that it is harder to find out about university opportunities than IDOA opportunities. She mentioned that she didn't know how to find out about the university opportunities. She said, "I'm not going to say they don't have them posted somewhere, but I have no idea where. I don't think the universities have done a good job there." [#7]
- A Black American female owner of an MBE-certified professional services firm stated that learning about prime contractor or subcontractor opportunities with the state is a barrier, because she does not know where to go. She noted that she does know where to go for city-based opportunities. [#29]
- A Subcontinent Asian American owner of an MBE-certified professional services firm reported that it is harder to find out about opportunities with the state. He went on to comment that this is due to poor communication from the state. [#49]
- When asked about the difficulty in finding out about opportunities, a non-Hispanic white female owner of a WBE- and DBE-certified architectural firm indicated that it is harder to find out about opportunities with the state agencies. She added, "You have to go ask." [#73]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm stated that work with public universities is hard to find out about. He said that he has been contacted directly by the school in the past. He stated that it is easy to find opportunities with INDOT because everything is listed on the website. [#57]
- The non-Hispanic white female owner of a WBE-certified professional services firm mentioned that it is a barrier to register with the universities because you have to do it individually for each university. She said that you have to repeat all of the same information at each site. She indicated that it would be helpful if there was one central website location to sign up for all the state universities. [#5]

- The Hispanic American male chair of an Indiana minority-focused business council reported that State agencies and colleges should improve their bid process communications. He added that people need to know about opportunities with the participating entities. [#46]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm noted that all the universities have their own bidding pages. He pointed out that IU has all of their plans online. He indicated that Purdue does not keep those documents online. He said that it is necessary to go to a local office and pick up paper documents in order to get the appropriate documents for Purdue. He said, "It may cost you $200 for the plans, and it quickly became cost prohibitive, especially when we were starting out." [#32]

  He stated that he liked the idea of all the universities having all of their projects on one website. He said, "If they just did it like IDOA where they have all the projects available on one site. If they were to have a 'Work with Indiana' webpage, and here's a link to INDOT, here's a link to IDOA, here's a link to IU, here's a link to Purdue. Something like that, where it's all in one spot. That would be very handy." [#32]

Bidding process relative to other public agencies and colleges. Some of the interviewees had favorable comments related to bidding or other processes at the participating institutions. [e.g., #6, #11, #42] Other interviewees reported difficulties or had suggestions for improvement. Some examples included the following:

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female reported many barriers in the bidding process, including the bonding requirement, capitalization, and the requirement to use union work or prevailing wage. He also indicated that payment is slower and jobs are more competitively bid in the public sector. [#3b]
- The non-Hispanic white female owner of a specialty contracting firm commented that environmental concerns on college campuses can be a barrier for her business. She stated, "Safety issues ... can be terrible. They want zero pollution, zero hazards, and I have to go through safety classes. They're so fussy." [#8]
- A non-Hispanic white male veteran owner of a non-certified construction firm indicated that a problem is all the different documents required by the different universities. He said, "IU has their set of documents. Purdue has theirs. All this documentation you have to have and sign for this, that, and the other. It's ridiculous. You have to fill out this form and that form. Notarize it, sign it in blue ink. There needs to be some uniformity. If you're going to do it, do it the same everywhere." [#10]
- The Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm said that, in her experience, the bid process for participating entities was straightforward. [#51]
- When asked about the bid process, a non-Hispanic white male representative of a majority-owned specialty contracting firm commented that it is about the same for

all of the state agencies. He explained that if a firm signs up for notifications of upcoming jobs, the state agency sends out an email each time an opportunity for a bid arises. [#54]

- When asked for recommendations for the agency to improve its bid process, the non-Hispanic white male representative of an Indiana small business development center responded, "Accessibility. That's not just an IDOA thing, but a state government thing. I think all state offices can be more accessible to the public." When asked about INDOT, he stated, "I have really good experiences with INDOT. They are fairly good about being accessible." [#47]
- A non-Hispanic white female owner of a WBE- and DBE-certified construction firm noted that the bid process for INDOT is the easiest, because it is electronic and all of the quantities are given to you up front. She said that, in contrast, bids for Ball State University's (BSU's) jobs are complicated and require a lot of paperwork. [#55]
- Regarding the bidding process, the non-Hispanic white female owner of a WBE- and DBE-certified professional services firm remarked, "It has become [more fair], and the point systems help." She added, "[Sometimes], you never know what is really going on behind the scenes." [#73]

Prequalification. Just a few interviewees had additional comments about prequalification processes with the participating entities.

- When asked about prequalification experiences, a Hispanic American owner of a non-certified specialty contracting firm explained, "Like I said ... [I get all my work by] word-of-mouth ... They don't call us unless they think we can do it." [#41]
- A non-Hispanic white female owner of a WBE- and DBE-certified construction firm explained that INDOT prequalifies bidders once a year. She said the colleges are different because they do not require prequalification. When a bidder submits a bid, they must include information that could qualify them. [#55]
- The non-Hispanic white male representative of a majority-owned construction firm stated that both IDOA and INDOT require prequalification. He stated, "Both had a difficult decision-making process. This is the biggest downfall. It was hard to get through their own hierarchy to get decisions." [#66]

Receiving payment (relative to other public sector work). Interviewees also discussed their experiences related to receiving payment on work with the participating entities. A few had negative experiences. [e.g., #38, #73, #74] Many had favorable comments. Examples are provided below:

- The non-Hispanic white female owner of a WBE-certified goods and services firm indicated there are generally no issues with payment as the prime contractor, and that working with the SEIs has been a wonderful business for her. [#1]
- A non-Hispanic white male representative of a specialty services firm indicated that Ivy Tech's payment time has been great. He said, "Ivy Tech has been timely. They send me an email the day before to alert me that payment will be coming." [#20]

- A non-Hispanic white male veteran owner of a VBE-certified professional services firm mentioned that getting timely payment from state agencies was not a problem for his business. [#32]
- A Hispanic American owner of a non-certified goods and services firm indicated that INDOT was easy to work with, and that they had no problem with timely payment. [#33]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm indicated that the payment process for a project with IAA went smoothly. She commented, "They asked for us. We quoted them upfront. They paid us within 45 days." [#36]

  On the IUPUI project, the same business owner noted that the school asked a few people to bid on their product. She stated, "That process was really good. They paid us 50 percent in advance when they confirmed the order ... I was very happy with them. I don't mind having that type of customer." [#36]
- When asked about payment by SEIs, a Hispanic American owner of a specialty contracting firm commented, "Everybody's been good. Those guys have always [paid] within 90 days." [#41]
- A non-Hispanic white male owner of a construction firm reported that the payment process with IU was "quick and easy." [#61]
- Regarding USI, Ivy Tech, and Vincennes University, the non-Hispanic white male representative of a majority-owned construction firm had mostly favorable experiences related to payment. He added that most of the universities use progress payments, which are preferred. However, he noted that the firm sometimes struggles to get final payments if there are work-related issues that need to be resolved. He said that this is often used as a reason to withhold the final payment. [#66]

Recommendations. Interviewees had wide-ranging suggestions for improvements to procurement and contracting with the participating entities.

Some comments pertained to establishing a centralized way to find out about opportunities across the participating entities, or establishing better communication in general. Recommendations included the following:

- When asked about recommendations to improve the notification and bid process the participating entities, the non-Hispanic white female director of the Indiana chapter of a national organization for woman business owners explained that there should be a single place to find opportunities. She stated, "If I want to encourage the business, how do I make it really easy to capture the information in one website or location?" She went on to note that small businesses in particular do not have time to search multiple places to find opportunities. [#45]

When asked about the participating entities' administration of contracts and payment methods, the same interviewee stated, "It's a little antiquated. It could be more streamlined and efficient." [#45]

- A non-Hispanic white female owner of a WBE-certified professional services firm stated that she would like to have more information and know who the contacts are at the participating entities so that she could contact them. [#52]
- A Native American male owner of a non-certified construction firm stated that Indiana should streamline the bidding process. He added that Indiana should have a website that lists all of the State of Indiana projects, the architects for the projects, and the specifications and checklist requirements. [#71a]
- A Black American female owner of an MBE- and WBE-certified professional services firm recommended more communication from state agencies to small businesses. She commented, "Use texts, emails, news!" [#2]
- The non-Hispanic white male owner of a construction firm stated that opportunities for work should be better publicized. He stated that he needed more time prepare his bid. [#75]

  The same business owner added that he would like more verbal communication and a uniform way for the state to get information out, including more publicizing. [#75]

Some interviewees recommended better follow up and feedback for bidders and proposers. Examples of suggestions are provided below:

- A Black American owner of a DBE- and MBE-certified professional services company said, "If I bid and not get the job, then I want to inquire if I was high or low. How come I didn't get it?" He noted that the agencies did not give him much feedback on his bids. [#19]
- When asked for recommendations in improving the administration of contracts or payment methods, the non-Hispanic white representative of an Indiana small business development center stated, "I would try to make things more transparent just so there are more opportunities to make it an open process ... I know that the state does some of these things, but they are 'on request.' I would try to make that point as clear as possible ... If you want to come in and talk about why you were not selected for [something], make that known. I think that's a better way that the state can serve its customers ... Maybe outline keys to success instead of just saying, 'Well, we're going to be having an interaction with primes here in Indy.'" [#47]

  The same interviewee added, "Probably one of the biggest things I've seen is that it's a major time commitment to register as a disadvantaged business, and sometimes the return on investment isn't there for some businesses as it is for others ... Then, driving down to networking events with these primes ... is more time that entrepreneurs and small business owners are away from their businesses. If there is any way that we can keep that in mind, that time is just as valuable as money when it comes to small business ... We may not think that, 'Hey, come on

down for an afternoon' is a big deal. But, if you're driving from Evansville, that's three hours and you might have to stay overnight or come back late that night. Just be cognizant of those constraints." [#47]

Other interviewees recommended other changes to procurement methods that might help small businesses. Examples include:

- A non-Hispanic white male owner of a construction firm recommended that all the contracts for mechanical, electrical, and plumbing should be prime contracts rather than working through a general contractor. He also noted that when it is all through a general contractor, all the subcontractors have to wait until the project is completed to be paid. He said that the completion of the project may be a year after they have done their part of the contract. He said, "If I could change just one thing, it would be that."[#18]
- A non-Hispanic white male representative of a majority-owned professional services firm made a recommendation for INDOT regarding their payment process. He stated that, concerning timely payments, INDOT needs people to be held accountable. He also noted that it is difficult to get ahold of anyone at INDOT to discuss this issue. He indicated that he felt INDOT was taking advantage of them because they are a small business. [#20]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm recommended that public agencies give a portion of their contracts to small businesses or minority- and woman-owned businesses. She said, "Give us a chance to show what good work we can do." She also recommended that public agencies should be careful to not place excessive insurance requirements on contracts. She stated, "Don't just say you want to give business to the minorities. Actually do it. If you don't want to do it, then don't make them have the extra cost [for insurance]." [#36]
- The Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm said that she recommends that the participating entities "make bonding a lot easier." She then mentioned that she lost opportunities at Purdue and IUPUI because she could not secure a sufficient level of bonding. [#51]
- When asked for recommendations on work with the participating entities, a Black American owner of a professional services firm recommended to "do joint ventures ... If we have the ability [to do a] joint venture, then you have people who produce skills year to year ... because you are building those skills, you are broadening your base." [#67]
- A non-Hispanic white male representative of a majority-owned professional services firm stated that in order to find small business resources, he did have to do some "digging." He added that this process could improve if the participating entities were to market directly to the relevant small businesses. [#72]
- The non-Hispanic white female representative of a trade organization reported that, for most of their members, if they are not certified, they do not even attempt to bid. Her recommendation is to make the certification process easier. [#50]

G. Other Allegations of Unfair Treatment

Interviewees discussed potential areas of unfair treatment, including:

- Denied opportunity to bid *(page 110)*;
- Bid shopping and bid manipulation *(page 112)*;
- Treatment by prime contractors and customers during performance of the work *(page 115)*;
- Unfavorable work environment for minorities or women *(page 115)*;
- Any disadvantages for small businesses regarding these issues *(page 117)*; and
- Any double standards for minority- or woman-owned firms when performing work *(page 118)*.

Denied opportunity to bid. The interview team asked business owners and managers if they had ever been denied the opportunity to bid.

Some interviewees said that they had been denied the opportunity to bid on projects. Some specifically attributed the denial to discrimination. [e.g., #23, #25, #31, #66, #71a]

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female reported that his firm sees denial of the opportunity to bid "all the time." [#3a]
- A Black American male owner of a certified specialty contracting firm reported that he has been denied an opportunity to bid. He mentioned being denied the chance to bid on hotel business or the medical school because he did not receive any notice about the projects. He said, "They didn't contact me. I should be on the list." [#19]
- The non-Hispanic white female owner of a non-certified construction firm noted that on a few jobs, the client did not contact her to bid because the client wanted to hire someone's relative or good friend. [#24]
- The non-Hispanic white female owner of a WBE-certified professional services firm reported that she has been denied an opportunity to bid. She reported, "There was an RFP for the renovation and possible addition to a building. We put in our qualifications. But I quickly found out that we were never going to be considered, ever. I said, 'We just spent all this time and money, and we were never going to be considered.' What's hard as a small company is that you try to chase everything that you feel you have a true chance at. You put a lot of energy, money, and resources into it, but then you find out you were never going to be considered for whatever reason. I wish they would just ask the ones they are really considering. They ended up hiring someone from out-of-state. They didn't adhere to the Buy Indiana program at all." [#30]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm commented that she is not sure if they have been denied an opportunity to bid. She stated that when she does not know the prime contractors,

or she does not get asked to bid on a project, she is unsure whether they have been denied or not. She said, "Since we have not been able to reach them, they have not been able to ask us for a quote. There is some kind of barrier there which we need to break, but I don't know how to do that." [#36]

- The Subcontinent Asian American female owner of an MBE-certified goods and services firm added that they may have lost some business because their speech is different, but that is part of business. [#36]
- A non-Hispanic white female owner of a WBE-certified professional services firm stated "No, but you don't know if you are [denied an opportunity to bid]!" [#52]
- A Black American male partner in an MBE-certified specialty contracting firm said that he feels he is being denied the opportunity to bid when he gets a bid invitation at the last minute. He said that, when this happens, he does not have enough time to put a bid together. He added that it allows them to say that they contacted a minority, and that they can also say that the minority chose not to bid. [#53]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm indicated that he was denied an opportunity to bid. He said that it was based on the fact that his business was too small, and that he did not have the resources to complete the project. [#57]
- The non-Hispanic white male owner of a specialty contracting firm stated that he was denied the chance to bid on a job with Ivy Tech because they wanted to work with a union company. [#59]
- When asked if he has been denied opportunity to bid, a Black American male owner of a professional services firm stated, "Absolutely. We run into that all the time with Housing and Urban Development [HUD] in Gary, Indiana. HUD got attitude." He went on to explain that he also finds this is the case in the City of Gary. He said, "The contracts don't go out to bid. When you bid, it's in a back room." [#67]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm indicated that he feels they are denied opportunities to bid when companies or public agencies feel they are too small to handle the work and do not accept their bid or even ask them to bid. [#32]
- The Black American male owner of a non-certified professional service firm indicated that he has experienced denied bidding opportunities. He stated, "The main companies in Terre Haute won't allow you to bid or to get a piece of their bid. They are taking all the bids from the smaller companies, [yet] they don't allow us smaller companies to even work with them." [AI#21]

Many interviewees indicated that they had not ever been denied the opportunity to bid. [e.g., #1, #7, #10, #11, #12, #14, #17, #18, #20, #21, #22, #23, #26, #28, #29, #33, #35, #38, #40, #41, #44, #49, #50, #51, #54, #55, #56, #62a, #63b, #65, #69, #70, #72] Interviewee comments include:

- The Black American male owner of an MBE-certified specialty services firm commented that he has never been denied the opportunity to bid because of his race. [#6]
- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners reported that she has not heard of any businesses that have been denied the opportunity to bid. [#45]
- When asked if he had ever been denied an opportunity to bid, the Subcontinent Asian American male owner of a goods and services firm responded, "That has never happened to me." [#58]

Bid shopping and bid manipulation. Business owners and managers often reported being concerned about bid shopping, bid manipulation, and the unfair denial of contracts and subcontracts through those practices.

Many interviewees indicated that bid shopping and bid manipulation were prevalent. [e.g., #8, #15, #25, #32, #33, #35, #38, #49, #55, #56, #59, #63b, #70, #73, #75] Many business owners had experienced it themselves. Examples of comments include the following:

- The non-Hispanic white female owner of a WBE-certified goods and services firm indicated she has seen bid shopping. Her business went through a time where individuals from state agencies were coming into her business and looking at products. She would spend an hour or so with them making their selection, writing out the specs for them, then they would put out an RFP with that information in it. She added that the state agencies did not even send it to her for a chance to bid, and that she eventually had to ask those people not to come in any more. [#1]
- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female stated that his firm sees bid shopping all the time. He also reported that prime contractors tend to reach out to invite the minority community very late (e.g., two days before the bid), and that they should be given the average two weeks notice. He commented that this makes it impossible for a WBE or MBE firm to respond appropriately. He also reported that this allows the hiring company to say they gave the firm the opportunity to bid. He later commented that the state has "no teeth" to enforce the requirements, and that companies get away with doing this because there are no fines or fees as consequences. [#3a]
- The Black American male owner of an MBE-certified specialty services firm reported knowledge of bid shopping, and commented that it he experience it when working with a state university. He reported that his firm had the low bid, and that ISU went out and asked others to beat his bid by a small amount. This happened on

a bid when the purchasing agent went out and got three bids. It was not a public RFP process where all the bids were open at a set time. [#6]

- A Hispanic American female owner of an MBE- and WBE-certified professional services firm mentioned that bid shopping has not happened to her, but she is aware of it happening to colleagues. She stated, "[My colleagues] put a lot of effort into the bid ... and then the primes don't use them on the contract, they use somebody else." She reported that one person may be asked to do a detailed proposal and cost plan, and that the prime contractor uses that information for another company that is eventually used on the bid. [#7]

- A non-Hispanic white male veteran owner of a non-certified construction firm reported that sometimes he sees bid shopping or bid manipulation after the contract has been won. He said, "The winning general contractor will call the subs and tell them he needs a 10 percent reduction. They are trying to beat the subs down. That is a practice that is implemented by some [general contractors]." [#10]

- A Subcontinent Asian American male owner of an MBE- and SBE-certified construction firm stated some general contractors are fair and allow everyone to bid and take the lowest bid. Other contractors discourage some companies from bidding and ensure that their favorite companies have the lowest bid at all times. He reported that he knows he has been locked out of some contracts because another contractor suddenly had a lower bid than his. He commented that he is not sure if it is because he is a small business or because he is a minority. He added, "It discourages me when I am not treated fairly." [#12]

- A Subcontinent Asian American female owner of an MBE-certified goods and services firm said that she has experienced bid shopping in the private sector but not the public sector. She noted, "Yes, it does [happen]." [#40]

- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners is familiar with bid shopping and noted one example of a member who had a contract that was misrepresented. The business was told one piece of what the contract needed, and once the bid was accepted, it changed. [#45]

  She also recounted instances where prime contractors used WBE subcontractors in bids, but after they were awarded that contract, they used a different subcontractor to actually perform the work. That is a way for prime contractors to get credit for having a WBE on the bid even though they choose another subcontractor in the end. [#45]

- When asked about bid shopping, the non-Hispanic white female representative of a trade organization stated, "Yes. It happened with me." She reported that, in 2013, she bid on a public sector contract and submitted her number to a prime contractor. She later found out that one of her competitors had all of her numbers and approached the prime contractor saying that he would beat her numbers by five percent. [#50]

- When asked about bid shopping, the Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm responded, "That's continual." She explained that she has twice had a prime contractor swap around the subcontractors. She said that a competitor had seen her offers. She stated that this is discouraging because of the time invested to prepare bid responses. [#51]
- A non-Hispanic white female owner of a WBE-certified professional services firm stated that bid shopping recently happened to her company. She said that a potential client sent out a list of her company's price and quantity information to other companies that were bidding on the project. She said, "[The potential client] specifically said ... [our prices and quantities] went out to all these companies ... They're totally bid shopping." [#52]
- A Black American female owner of an MBE- and WBE-certified professional services firm reported that she has seen bid shopping with the State of Indiana. She also reported seeing bid manipulation from a prime contractor on two separate occasions with the state. In one instance, she reported that it was a bait-and-switch situation. Her firm was on the bid as a subcontractor, but after the contract was awarded, the prime contractor brought in another subcontractor that charged less. [#65]
- A Native American male owner of a non-certified construction firm said, "The State of Indiana throws out the highest and lowest bids." He added that they choose a bid from the mid-range of bid responses, and that all the bidders are able to see what competitors have bid. He stated, "State officials talk. There is no such thing as a secret in the construction industry." [#71a]

Some interviewees reported strategies for avoiding bid shopping or bid manipulation. Some business owners and managers reported taking precautions to avoid falling victim to those practices. Examples of comments include:

- A non-Hispanic white male representative of a majority-owned specialty contracting firm reported that some people submit quotes at the last minute, presumably out of fear that there will be subsequent discussion about the numbers prior to the bid being submitted. He added that people call around to make sure they have the lowest number, but that this "is hard to prove." [#54]
- When asked about bid shopping, a Black American male owner of a professional services firm indicated that he distances himself from those involved in bid manipulation. He commented, "We don't participate in [bid manipulation]. [But] we've seen that." [#67]

Some interviewees reported no negative experiences with bid-manipulation. [e.g., #7, #9a, #11, #16, #17, #19, #20, #21, #22, #23, #41, #46, #57, #58, #59] Some business owners and managers said that they were not affected by bid manipulation.

Some interviewees reported that bid shopping is part of doing business. Examples include:

- The non-Hispanic white female owner of a non-certified construction firm stated that they have run into bid shopping, which may work against them or in their favor. She said, "I've had companies call me and say, 'I have this bid for so much, if you can match it, it's yours.' And then we take it. So, it works both ways." [#24]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm reported, "A lot of people worry about bid shopping, but when you're putting bids together, especially when you are a general [contractor] ... I mean, you're getting bids from everybody anyway. A lot guys won't give you a bid until the last day because they're afraid you'll bid shop. But, that's what you do. You ask half a dozen guys to give you bids, and you go with either the lowest or the best guy who can do the job ... I don't really know that bid shopping, to me, is that big of a deal. It is just part of the business, in my opinion." [#57]

Treatment by prime contractors and customers during performance of the work. Some business owners reported not experiencing negative treatment by contractors and customers during performance of work [e.g., #32, #35, #41, #63b, #66, #75]. Some did report negative treatment. For example:

- A Hispanic American owner of a non-certified goods and services firm reported mistreatment of their workers by union workers when they were working as a non-union contractor with a union contractor. [#33]
- A Black American owner of a specialty contracting firm stated that negative treatment during a job does happen. [#40]
- The Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm noted that sometimes there is negative treatment by general contractors, and that it was part of the male-dominated culture of the industry. [#51]
- A Black American female owner of an MBE- and WBE-certified professional services firm indicated that she has experienced unfair treatment by prime contractors on multiple occasions. She stated, "Yes, not paying and brow-beating on prices ... Basically, they wanted us to work the job with no margins." [#65]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated she has only experienced negative treatment once during the performance of work. She said that the general contractor was "under-handed" and tried to manipulate the situation to its benefit. She thinks that was an isolated situation. [#73]

Unfavorable work environment for minorities or women. Some interviewees reported examples of unfavorable work environment for minorities or women. [e.g., #16, #27, #41]

A number of interviewees reported experiences with working in unfavorable work environments. Examples of comments include:

- The non-Hispanic white female owner of a specialty contracting firm reported that sometimes she encounters an unfavorable work environment as a woman. She said, "Well yeah, I get talked about. I get flirted with. I get hit on and flirted with, but usually if I shut it down, there's no problem ... It's not always there and, a lot of times, it's just some greasy contract worker type person on the job, not necessarily the bosses. I get respect out of most people." [#8]

  The same business owner also reported that she has been offered a higher price if she would "mess around" with the customer. She commented that she does not do that, does not think about it, and just does her job. [#8]

- A Black American female owner of an MBE-certified professional services firm stated that when a minority attempts to move forward, they are kicked back. She indicated that no matter what you do or where you go, they are going to bring you back. She said, "There is always something that brings you back down." [#29]

- When asked about gender and sexual discrimination, a Black American female owner of an MBE- and WBE-certified professional services firm stated, "I have experienced it from a colleague who is ... a black man, who has said some things that I felt were very sexually discriminatory towards me, but I just ignored him." [#2]

- When asked about unfavorable work environments, the Hispanic American male owner of a specialty contracting firm indicated that he witnessed one incident. He then noted that it seemed to be an isolated case. [#62a]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated that in her industry, it is definitely male-dominated. She pointed out that sometimes at meetings or presentations, she is the only female. She said, "As a female, you have to show up and show them you really know what you're talking about." [#30]

- A non-Hispanic white female representative of a majority-owned specialty contracting firm stated, "I, personally, because I've been out in the field ... think this industry is hard for women to work in." She went on to say, "I would like to say that all our construction workers are gems, but they're not. I don't know that I've ever had a woman work out in the field. I don't know that we've had any apply." [#44]

- When asked about unfavorable work environments for minorities or women, the Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm explained, "Many times, they assume you're the secretary or the assistant." However, she indicated that in some ways, she is freer to ask questions being a woman. She also said that she does not believe that her minority affiliation causes her any issues, and noted that it was more about being a woman. [#51]

- When asked about unfavorable work environments for minorities and women, a Black American female owner of an MBE- and WBE-certified professional services firm indicated that she has had customers ask to remove a person who is a minority

without giving any evidence of performance issues. She also reported having white male customers cut her off and listen to her male employees instead, who happen to be white. [#65]

- When asked about whether she felt like she had been treated unfairly as a woman, the non-Hispanic white female owner of a professional services firm commented that she has experienced unfair treatment. [#68]
- When asked if he has been exposed to any unfavorable work environments, a Black American owner of a specialty contracting firm responded, "Not yet, but I know it is out there." [#40]

No knowledge of unfavorable work environment for minorities or women. [e.g., #17, #18, #21, #22, #43, #47, #57, #58, #59] Interviewee comments include:

- A Subcontinent Asian American female owner of an MBE-certified goods and services firm indicated that they have not experienced unfavorable work environments because they are a minority-owned business. [#36]
- The non-Hispanic white female owner of a WBE-certified professional services firm indicated that she has not experienced any unfavorable work environments. [#56]
- A Black American male representative of an MBE-certified goods and services firm reported that he has not seen any unfair business practices. [#69]

Any disadvantages for small businesses regarding these issues. Some interviewees indicated that some of the issues are because their businesses are small or exacerbated because they are small business owners. For example:

- A Black American female owner of an MBE- and WBE-certified professional services firm reported that being a small business makes some of the discriminatory and unfair practices worse. She stated, "I had someone tell me, 'Young lady, we're making you rich. So, I don't know why you wouldn't want to do what we ask you to do.' There is no czar or anyone at the state that you can call and point all these things out, or even send them a tape that they said it. So, you're on your own. Any concern we've ever had, they tell us it is business to business and they're out of it. So, we have made complaints, but ... there isn't anyone to intervene. There is no mediation." [#65]
- The non-Hispanic white female owner of a WBE-certified professional services firm pointed out that any barriers or challenges she encounters are due to being a small business and not a woman-owned business. She said that the professional services industry is generally less discriminatory towards women than the construction industry. She mentioned that she has heard some complaints from woman-owned construction businesses at National Association of Women Business Owners (NAWBO) meetings. [#5]
- When asked about disadvantages for small businesses, the non-Hispanic white male representative of a majority-owned construction firm reported, "The hardest part for small businesses is to gain the experience or trust of people who will hire them.

Most everyone wants someone who can show successful projects. Small businesses are hurt by the financial requirements. These are not really unfair, but [they] are hard to overcome. If a business is not going to be paid for 60 to 90 days, [then] that is hard for a small business." [#66]

The same representative also commented that because minority- or woman-owned businesses are usually small, they already have all the usual disadvantages of small businesses. He stated, "I've seen instances where the person is a great individual, but he or she can't be everywhere." [#66]

Any double standards for minority- or woman-owned firms when performing work.

Interviewees discussed whether there were double standards for minority- and woman-owned businesses.

Many minority and female business owners reported double standards based on race, ethnicity, or gender. For example:

- A Black American male owner of a specialty services firm stated that he believes he must work twice as hard to prove himself in his industry. [#16]
- The non-Hispanic white female owner of a WBE-certified professional services firm said that there is a double standard for women in her industry. She commented, "A lot of the time the men don't believe you can do what you say ... If I say something, it is taken one way. If a guy said it, it would be taken a totally different way and probably be seen as okay. It's usually when you're dealing with a lot of contractors. They don't want a woman coming in and telling them what to do." [#30]
- When asked about double standards for minority-owned firms, a Black American owner of a specialty contracting firm commented, "Yes, it is there ... That is a barrier that I work hard to overcome ... and it shows in quality of work." [#40]
- When asked about double standards for minority- or woman-owned firms, the Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm reported that there is a "huge difference." She explained that while an MBE and WBE certification can help you, it can also hurt you. She also commented that while minority status never gets brought up, WBE status does, and she recalled white males in her industry who asked her to check with her husband on business decisions. She also stated that, as with any company owner, she makes the business decisions. [#51]
- A Black American male partner in an MBE-certified specialty contracting firm commented that, as a minority, he is "held to a higher standard." He added, "[That] is fine, because we do better work anyway." [#53]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm commented that she believes there are double standards, particularly regarding networking at lunch. She said that, because she is female, she does not want to send the wrong message. [#73]

- When asked about double standards, a Hispanic American male owner of and non-certified specialty contracting firm reported, "We've been really lucky. There's a large amount of Latin minorities in this industry that do [my type of] work, and there's a huge language barrier for that directly with the client. For me, I can see the difference between contractors that have poor English skills and myself, and can definitely see that more work would come my way because I can communicate better. I can see it the other way. If I didn't, we could lose work." He said he was able to leverage being fluent in both English and Spanish, and that this has really helped him. [#41]
- A Subcontinent Asian American male owner of an MBE- and SBE-certified construction firm stated that some other contractors with limited experience struggle to get opportunities to bid and prove themselves. He does not know if this is because the businesses are minority- or woman- or just because they are less experienced. [#12]
- A Black American male owner of an MBE-certified specialty contracting firm reported that if there is a double standard, it is not because he is a minority but because he is new to the industry. He commented that prime contractors or customers may put a higher standard on new firms. He added, "Later on, they may give you some leeway on a deadline, but it's because they know you and have worked with you." [#22]
- A Black American male owner of a non-certified professional services firm indicated that he has experienced racial discrimination in his industry. He stated, "The field that I'm in a lot of minorities are not in, so I experience a lot of push backs. There are not a lot of opportunities available for minority business nor are we aware of the opportunities." [AI#22]

Some interviewees reported that minority- and woman-owned companies were held to lower standards. For example:

- When asked about double standards for minority or woman-owned firms, the non-Hispanic white male representative of a majority-owned construction firm commented, "Yes, there are times when we accept a little lesser quality because we need to comply with regulations. These business[es] need to use that as a training experience." [#66]
- The representative of a professional services firm owned by a Subcontinent Asian American male commented that a minority- or woman-owned firm can "get away with anything." He added, "They can do half the work and still get paid. I have witnessed it ... I think they get the benefit of the doubt." [#42]

H. Additional Information Regarding any Race-/Ethnicity- or Gender-based Discrimination

The study team asked interviewees about whether they experienced or were aware of other potential forms of discrimination affecting minorities or women, or minority- and woman-owned businesses. This part of Appendix E examines their discussion of;

- Any stereotypical attitudes about minorities or women *(page 120)*;
- Any evidence of a "good ol' boy" network or other closed networks *(page 123)*;
- Any other allegations of discriminatory treatment *(page 127)*; and
- Reports that the interviewee had not observed race-/ethnicity- or gender-related discrimination *(page 128)*.

Any stereotypical attitudes about minorities or women (or MBE/WBE/DBEs). A number of interviewees reported stereotypes that negatively affected minority- and woman-owned firms. [e.g., #16, #38, #48, #73] Comments included:

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female stated that there is a perception that minority-owned firms are looking for a handout. He said that his firm has to overcome that stereotype by providing a good service. Many companies will give MBE or WBE firms an opportunity but not give all of a project to one. [#3a]
- The Black American male owner of an MBE-certified specialty services firm commented that sometimes being MBE-certified can hurt you. He indicated that it can be stigmatized. He said, "All minority vendors are high [in price] and not competitive. They are late, or the quality is poor." He went on to add that there are perceptions that aren't necessarily accurate, and that he has to show that he doesn't fit any of those negative profiles. [#6]
- The non-Hispanic white female owner of a non-certified specialty contracting firm reported that she has run into other discriminatory treatment. She mentioned that she has shown up on a job and the guys expected the operator to be a man and not a woman. She stated, "I've showed up on a job, and the guy said, 'You mean you're it? They're not sending a man?' That's a comment that's been made to me ... I told them, 'I didn't think a man would handle it, so they sent me.'" [#8]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Generally, many people believe that minority firms and woman-owned firms [in this industry] are not as good as others, and that's not true. They are just as good. They may have different competencies that they are judged on, but they are just as good. But I think the general perception is that minority- and woman-owned [businesses] are not quite as good. In some ways I have that perception when it goes to federal work, because we do the mentorship thing. That's not really true." [#17]

  The same representative added, "We put a team together that had a serious minority component ... Once we really got to know the individuals and know the competency levels, it was not hard to find a place for them to do their work. Not at all. But you've got to want to do it, and I don't see a lot of firms that want to do it." [#17]
- A Black American male owner of an MBE-certified specialty contracting firm indicated that there is a negative stereotype associated with minority-owned businesses. He stated, "Some people have told me they are reluctant to use

minority-owned businesses because they are not as competent. They haven't had much success with minority-owned businesses. They are surprised when they find one that's professional and does things right." [#22]

- The non-Hispanic white female owner of a non-certified construction firm reported that she has run into stereotypical attitudes toward women. She said that she has experienced it first-hand. She stated that when people call, they think she is the secretary and are surprised when they find out that she is the owner. [#24]
- The representative of a WBE-certified professional services firm owned by a non-Hispanic white female stated that she has seen stereotypical attitudes toward women. She indicated that older people, who still expect the industry to be "a man's world," dominate her industry. [#26]
- When asked about stereotypical attitudes about minority-owned businesses, a Black American male owner of an MBE-certified goods and services firm indicated that sometimes you can sense the negative stereotypes. He said that he has not run into any blatant or obvious stereotyping. [#27]
- The Black American owner of a professional services firm said that there is an unconscious bias that minority- or woman-owned firms do not have the skills or knowledge to complete the project correctly. He went on to explain that he sees this primarily in the private sector. He added that in the public sector, there is more of an effort to work with minority- and woman-owned businesses because there is more accountability. [#37]
- A Black American male local chairperson of a trade organization expressed that minorities have challenges when going into certain fields, including "a lack of established presence." He elaborated, "From my own experience, I can count on one hand the amount of minority students in [the discipline that I taught] in my one-and-a-half years there ... It's probably the most popular school in the country. In the back of your mind is, 'ok, maybe that's not what we do.' At the same time, you see friends and people you've studied with dropping out, and its like, 'I need proof that I can actually do this.' It's subconscious, but at the same time, it's there." [#39]
- A Black American male owner of a specialty contracting firm commented that, while he has not experienced any stereotypical attitudes about minorities as the owner of his current company, he did in the firm he owned previously. [#40]
- A non-Hispanic white female representative of a majority-owned specialty contracting firm reported instances where others were "hesitant to trust" her. She reported, "Yeah, there's still some discrimination, and yes, construction is still a man's industry ... I think women are still capable of running businesses, scheduling work, bidding work. Everything but the physical aspect of it, I think women are 100 percent competent at. Unfortunately, it is still a little bit of a 'boys club.'" [#44]
- In discussing the barriers for woman-owned businesses, the non-Hispanic white female representative of a trade organization commented, "I do think woman-owned [businesses] have to prove themselves. I guess, in my industry, it's not just

given that I know what I'm talking about. [For] every customer, I have to prove that I'm not the secretary." [#50]

- The Hispanic American female owner of a non-certified MBE- and WBE-certified specialty contracting firm is aware of stereotypical attitudes and unspoken assumptions by customers and others in the industry. She said that the assumption is that the quality of work from minorities or women is lower than it would be from a majority-owned business. [#51]
- A non-Hispanic white female owner of a WBE-certified professional services firm stated that the only time she has experienced stereotypical attitudes about WBEs was when participating in a convention in a neighboring state. A male attendee of the conference "gave us a hard time about being a certified WBE." [#52]
- A Black American partner in an MBE-certified specialty contracting firm commented that a lot of people do not believe that minorities do a quality job. [#53]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "There's one [business] in particular that won't even see me, and I think it's because I'm a woman. I had one of my reps with me, and we both went down to make a presentation, and the gentleman at that [business] would not even look at me. He only spoke to the rep, and the rep was just there with me as a favor. I was the one presenting the proposal, not the rep. Some people just don't want to [work] with women. They don't think women are capable." [#56]
- When asked about stereotypical attitudes about minorities or women, the non-Hispanic white male veteran owner of a SDVOSB-certified construction firm stated that stereotypical attitudes exist, particularly for women. He said, "Especially construction jobs ... most generals are pretty iffy on hiring women [and] whether they can do the job or not." [#57]
- When asked if he had seen any stereotypical attitudes about minorities or women, a Black American male owner of a professional services firm responded, "Definitely." He went onto explain that he feels this way because, "[Large firms] are not recruiting black colleges. They are not going to do that ... People don't want to share." He explained that one large company had three black industry professionals out of 125 industry professional employees in the firm. About 30 years later, this same firm still only has three black industry professionals. [#67]
- The non-Hispanic white male owner of a construction firm said, "Everybody wants to hire a veteran ... The white male American is discriminated against in many ways." [#75]
- The Black American male owner of a non-certified construction firm indicated that racial and ethnic discrimination affected the kind of work that was available to his firm. He stated, "African American[s] seem to be getting the leftovers jobs that [have] already been bid on or taken, while the other minority groups are [able to] obtain the big government jobs." [AI#1]

Any "good ol' boy" network or other closed networks. There were many comments about the existence of a "good ol' boy" network or other closed networks.

Those who reported the existence of a "good ol' boy" network included minority, female, and non-Hispanic white male interviewees. A number of interviewees thought that the "good ol' boy" network negatively affected woman- and minority-owned firms. [e.g., #3a, #12, #18, #19, #27, #36, #37, #40, #48, #53, #55, #63b, #66, #71a, #73] Examples of such interviewee comments include:

- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners reported that "good ol' boy" networks definitely exist. She indicated that being minority- or woman-owned could be a barrier for businesses, as they may not be in "the network" and may not have the necessary contacts. She provided the example of a nearby county that had a project coming into town. One of the organization's members would have been a good candidate to handle the project, but she was never made aware of it. Another very politically involved company got the opportunity. [#45]
- The non-Hispanic white female owner of a specialty contracting firm stated that there is a "good ol' boy" network, and that she is not in it and cannot be in it. She did not say whether it negatively affected her business, but did comment, "You just don't fit into some stuff." [#8]
- The Black American male owner of an MBE-certified specialty services firm reported that the biggest barrier for minority- and woman-owned businesses is the "good ol' boy" network. When asked about the network, he said, "One contractor told me, ... 'My father started this business. I'm 14 and I'm working in this business. We bought all this stuff from [an established supplier]. And so, we've bought it from them ever since. But I can tell you we're never going to buy these supplies from you.' But I said that's why they have minority and woman business programs because they want to break down the "ol' boy" network. I know in this contractor's case, it had nothing to do with racism, sexism, any of that. It's just the "ol' boy" network." [#6]

  The same interviewee went on to report that the "good ol' boy" network is a problem and is tough to break down. He said he sees it on both the customer and supplier side. He noted that there are some lines or brands that he cannot get. However, he added that in the 1960s, there were written laws against him or any minority-owned doing business in Indiana or going into certain places. He said, "[A private company] is still not adding distributors. So, I couldn't do it [in the 60's], and now they won't let me or anyone do it." [#6]
- A Hispanic American female owner of an MBE- and WBE-certified professional services firm noted that the "good ol' boy" network does exist. She said that she feels it is a barrier because she is not in that network. She stated, "It's a barrier, but it's because we don't know each other. Once we get to know each other, then it's not a barrier." She went on to indicate that she sees the "good ol' boy" network in both the private and public sectors. [#7]

- A Black American owner of a specialty services firm reported that a "good ol' boy" network exists in his region of Indiana. [#16]
- A Black American male owner of an MBE-certified specialty contracting firm noted that he feels the "good ol' boy" network exists in the construction industry. [#22]

  The same interviewee pointed out that sometimes he believes that some companies have access to more information than other companies do. He said that this might be because they did the project last year or know the company that did it last year. [#22]
- The non-Hispanic white female owner of a non-certified construction firm mentioned that she occasionally encounters the "good ol' boy" network. She noted that some men in the transportation business have big egos and think that they know more than her, even though she has been in the business for many years. The same business owner indicated that the "good ol' boy" network has hurt her firm's business. [#24]
- The representative of a WBE-certified professional services firm owned by a non-Hispanic white female reported that she has run into the "good ol' boy" network and that it resulted in her losing work. She commented, "It was a case of the [client] feeling I was a woman, and [that] he could do it better." [#26]
- The non-Hispanic white female owner of a WBE-certified professional services firm pointed out that there is a "good ol' boy" network in her industry because it is so male-dominated. She noted that she used to be part of that network with her former partners. She said that it is more challenging for her firm to get into the network now because she is a WBE. [#30]
- When asked about "good ol' boy" networks, a Hispanic American male owner of a professional services firm commented, "Oh, yes, there are definitely good ol' boy networks." He thinks that the entire community in which he lives and works is a "good ol' boy" network. He has also seen it in bid processes with a local municipality. He went on to report that he has not been able to break into that closed network, and he does not bid on projects for the City any longer. [#38]
- When discussing additional barriers that might exist, a Black American owner of a specialty contracting firm commented, "Some jobs, it just doesn't depend on ... what you know, but who you know." [#40]
- When asked about "good ol' boy" networks and other closed networks, a Hispanic American owner of a specialty contracting firm noted, "It's in Indiana ... It's very hard for me to prime in Indiana ... I see [the closed network] here ... A majority of my direct work in Indiana is sub work because of that network." [#41]
- The non-Hispanic white female representative of a trade organization stated, "Yes. I would say there is a huge "good ol' boy" network. There's a pretty big one." She reported that in South Bend, they are making progress. [#50]
- When asked about "good ol' boy" networks or other closed networks, the Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm

responded, "They are definitely there." She noted that the industry is generational and that developing strong relationships is a key to success. [#51]

She went on to say that she believed the lack of being able to bond was attributable to not having the relationships at the owner-level. Her industry is a white-male-dominated industry, and some of the ownership network of companies goes back generations. She said that white men run all those companies. She stated that, to her knowledge, she is the only woman-owned company of her type in Indiana, and this means that she had a lot of problems getting access to information and the market. [#51]

- Regarding "good ol' boy" or other closed networks, the Subcontinent Asian American male owner of a goods and services firm commented, "I have come across those, yes." He stated that certain relationships (e.g., between large customers and their suppliers) are beneficial to those in the relationship. He also reported that he had knowledge of closed networks that have existed in certain state universities. [#58]
- The Hispanic American male owner of a specialty contracting firm indicated he has seen "good ol' boy" networks within the school system. He said that he has tried to break into that market, but he has been unsuccessful. [#62a]
- A Black American male owner of a professional services firm reported that his experience with the "good ol' boy" or other networks was that "they're mostly closed [networks]." [#67]
- When asked whether she thinks there are "good ol' boy" networks or other closed networks, the non-Hispanic white female owner of a WBE- and DBE-certified professional services firm said, "Yes, I think they are out there." She added that there are still networks that are very male-dominated. [#73]
- The non-Hispanic white male representative of a majority-owned goods and services firm reported that he sees "good ol' boy" networks and other closed networks more in the private sector than he does in the public sector. [#15]
- A Subcontinent Asian American male owner of a DBE- and MBE-certified professional services and construction firm stated "I am always an outsider. In this county, what I have noticed ... is always the 'old boy's' network. Some people talk to me, and some people don't even talk to me. I do see that, but overall still, I think it's a pretty fair playing field." He added that he has learned to break through some of the barriers and explained that, overall, the firm has been able to adapt to some of these things over time. He said that the firm is able to grow to a certain level, but to grow to get the next level, it is much harder. [#74]
- A Subcontinent Asian American owner of an MBE-certified professional services firm commented that closed networks exist, and that they "make it difficult for many small businesses to get work." [#49]
- A non-Hispanic white male owner of a goods and services firm stated that the "good ol' boy" network is alive and well. He stated that it might affect him negatively. He gave the example of a new factory in his town. He explained that he did all the work

and had a good rapport with the company and was taking care of all the supplies. Then, he said, "The company hired a new person to handle supplies. This person had a relative that worked for another ... supply company and then, I was out and never heard from the company again." [#25]

- A non-Hispanic white male veteran owner of a VBE-certified professional services firm reported that they experience the "good ol' boy" network on a regular basis, especially locally. He stated that there are a lot of personal relationships in the business. [#32]
- The Hispanic American male owner of construction firm indicated that the "good ol' boy" network prevented opportunities for minority businesses. He stated, "It has been difficult for us because we are a smaller minority-owned business and larger companies do not want to give us the opportunity to work with them." [AI#2]

Some firms report being members of a "good ol' boy" network or finding it helpful. Comments mostly came from non-Hispanic white males, but not exclusively.

- A non-Hispanic white male representative of a majority-owned professional services firm reported that his firm may be a part of the "good ol' boy" network since they have been in the business a long time. He said, "If you're friends and know somebody, and then you have someone you don't know, you're more likely to take your business to the person you know." [#20]
- A non-Hispanic white male owner of a goods and services firm indicated that they run into the "good ol' boy" network, and that it positively affects them because there are not many firms like his. He went on to comment that they are part of the "good ol' boy" network in their industry. [#28]
- The non-Hispanic white male owner of a contracting firm reported, "There's a lot of that going on. It's good if you're in it." [#75]
- A Hispanic American owner of a professional services firm reported, "This whole community operates very much on that principle. I have gotten work based on that principal alone." [#43]
- A Hispanic American male owner of a goods and services firm indicated that there is a "good ol' boy" network, but it has not negatively affected them and their business. He said, "It's a part of business. We get some 'good ol' boy' network jobs too because we have networked with somebody for a while." [#33]
- A non-Hispanic white female owner of a WBE-certified professional services firm commented "There are [some closed networks], especially as you look at the local business ... there's definitely a network there." She explained that the "good ol' boy" network has both hurt her and helped her. "We have to develop our own relationships ... I had to learn how to golf ... [and] lunch is a big thing ... [as well as] meeting for coffees." [#52]

Some interviewees indicated that closed networks are unavoidable. Examples of comments include:

- The Hispanic American chair of an Indiana minority-focused business council reported, "You're always going to find some of these [closed networks] ... One thing that tells me is that [the business in the network is] well-connected, so he's doing something right. I doubt he's giving money under the table, so ... I guess if he got it because he's working on it, you can't blame him." [#46]
- A non-Hispanic white male veteran owner of a construction firm mentioned that the "good ol' boy" network does exist. He said, "Oh yeah, it exists, and I believe it will always exist. Like-type people are going to congregate and work with each other." [#10]

Any other allegations of discriminatory treatment. Some interviewees had comments related to topics not discussed above.

- A Black American female owner of an MBE- and WBE-certified professional services firm stated, "There's no other black woman in the market that does what I do, but I see my work going to white counterparts." She commented, "I don't get invited to the table [as a minority business owner]." She indicated that this is very frustrating for her. She also indicated that she does not get invitations to bid but instead sometimes gets them as part of relationships with other subcontractors. She added, "I would like to be invited." She also reported that she had an experience where a subcontractor used a racial slur directed towards her in a misdirected email. [#2]
- The Black American owner of a professional services firm expressed that one problem is that minority- and woman-owned businesses are not taken seriously. Some firms do not even want to consider them. [#37]
- When asked about additional challenges or barriers as a minority- or woman-owned business, the non-Hispanic white female representative of a trade organization stated, "In construction, the big thing is you are a woman. You have to establish your knowledge base. It is not accepted that you know anything. Proving is number one, [proving] your credibility, your knowledge base ... Any woman that is in construction, that is their first [challenge]. It is not given that we know what we are talking about. It has to be proven." [#50]
- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners said that there are disadvantages to being a minority- or woman-owned small business. She said, "With the Midwest, sometimes we're not always looked at the same way as a male-owned business. That seems to be the general conversation. Sometimes there is a fear of ... someone moving up the ladder and then having a child. You can't start a business and then have a child and take three months off." [#45]
- A Hispanic American female owner of an MBE- and WBE-certified professional services firm said that, "Sometimes the client slips and says, 'We have to use you because you are a minority or a woman.'" She added that if clients are only using

her company because she is a minority or woman, then that is demeaning and not a good partnership. [#7]

- A Black American male owner of a professional services firm said that there are not many black professionals in his profession in Indianapolis, so there are not many other people to talk to about race-specific challenges to starting a business. He said this is a barrier for him as he tries to improve his business by learning new skills. He said that there needs to be a path to skill building, and that if there is a belief in diversity, then schools should encourage black students to do math and invest in diversity. [#67]
- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female stated that, as a WBE and MBE, his firm is treated with little respect. He said that he believes that the larger firms act like they are doing MBEs and WBEs a favor if they place them on a job or bid. [#3a]
- A Native American male owner of a non-certified construction firm stated that while he cannot prove any allegations of discriminatory treatment, he feels it exists. He commented, "I'm sure it's out there," and went on to explain that if he went to a bid meeting dressed in his work clothes and with his regular truck, he would seem "small." He then indicated that some competitors rely on appearance over substance, and that they try to impress others and win business by dressing nicely. [#71a]
- The non-Hispanic white female owner of a WBE-certified goods and services firm indicated that discrimination is prevalent in the agencies. She stated, "Government entities themselves seem to be not interested in working with woman- or minority-owned businesses, and the state government and certain universities seem to be not helping the situation." [AI#17]

Reports that the interviewee had not observed race-/ethnicity- or gender-related discrimination. [e.g., #58, #59, #69, #73] Some interviewees reported that they had not observed stereotypical attitudes or the "good ol' boy" network negatively affecting minority- or woman-owned firms.

- The non-Hispanic white male owner of a construction firm reported that he has not witnessed any stereotypes of minority-or woman-owned businesses. He also noted that he does not believe there is a bias against women as long as they are knowledgeable. [#23]
- A non-Hispanic white male owner of a goods and services firm stated that he has not really run into the "good ol' boy" network in his business. [#31]

I. Insights Regarding Business Assistance Programs, Changes in Contracting Processes or Any Other Neutral Measures

The study team asked business owners and managers about their views of potential race- and gender-neutral measures that might help all small businesses, or all businesses, obtain work in the Indiana contracting industry. Interviewees discussed various types of potential measures

and, in many cases, made recommendations for specific programs and program topics. The following pages of this Appendix review comments pertaining to:

- Technical assistance and support services *(page 129)*;
- On-the-job training *(page 130)*;
- Mentor-protégé relationships *(page 131)*;
- Joint venture relationships *(page 134)*;
- Financing assistance *(page 135)*;
- Bonding assistance *(page 136)*;
- Assistance in obtaining business insurance *(page 137)*;
- Assistance in using emerging technology *(page 138)*; and
- Other small business start-up assistance *(page 139)*;
- Information on public agency contracting procedures and bidding opportunities *(page 141)*;
- Online registration with a public agency as a potential bidder *(page 142)*;
- Hardcopy or electronic directory of potential subcontractors *(page 143)*;
- Pre-bid conferences where subcontractors can meet prime contractors *(page 143)*;
- Distribution of lists of plan holders or other lists of possible prime contractors to potential subcontractors *(page 144)*;
- Other agency outreach such as vendor fairs and events *(page 145)*;
- Streamlining or simplification of bidding procedures *(page 146)*;
- Breaking up large contracts into smaller pieces *(page 147)*;
- Price or evaluation preferences for small businesses *(page 149)*;
- Small business set-asides *(page 149)*;
- Mandatory subcontracting minimums *(page 151)*;
- Small business subcontracting goals *(page 151)*; and
- Formal complaint and grievance procedures *(page 152)*.

Technical assistance and support services. The study team discussed different types of technical assistance and other business support programs.

The majority of business owners, regardless of whether aware of technical assistance and support services, reported that most services named above would be helpful. [e.g., #3a, #9a, #15, #18, #19, #20, #21, #22, #24, #25, #27, #28, #30, #32, #33, #35, #36, #37, #42, #48, #55, #56, #57, #59, #60, #62a, #65, #66, #69, #70, #73, #74, #75] Examples include:

- The Black American male owner of an MBE-certified specialty services firm reported that he did not need business assistance programs but that other companies would be helped by them. He mentioned there is the state Small Business Development Center (SBDC). He said the SDBC will give five to ten hours of help. There is also the Minority Business Development Association (MBDA) center, which is a federal center that is run through the states. He stated that he can use the MBDA even though he does not qualify as a Federal DBE. [#6]

  The same interviewee went on to note that some of the listed programs are available, but not through the state. He also said that if the state is not doing some of those, they should start to do them and give people access to them. [#6]

- The non-Hispanic white male owner of a construction firm reported that technical assistance would be important to small companies. He stated that bookkeeping is important to 99 percent of small businesses. He noted that companies may know estimating and bidding, but they do not keep adequate records. [#23]

- When asked about technical assistance and support programs, a Black American owner of a specialty contracting firm responded, "Yes, it would benefit [my company], and, if offered, I would jump on it." [#40]

Some business owners and representatives reported being aware of technical assistance and support services programs and having used them, but may or may not have had successful experiences. Examples of such comments include the following:

- The non-Hispanic white female owner of a WBE-certified goods and services firm indicated she has not used any business assistance programs, and she doesn't think it would be good for the state to get involved in that type of assistance. She said, "No. I mean sincerely, I would not accept ... I just don't think the state is the one who can make that kind of suggestion. My perception is very off. Sometimes, when the state puts a program in place, 'here's the box, climb in the box.' Then they don't ... even keep the box clean." She later added, "I would not be interested. Any of these things I think I could do better privately."[#1]

- The non-Hispanic white female owner of a WBE-certified professional services firm mentioned that she gets a lot of invitations to various training or educational programs from the City of Indianapolis or the state. She said she has tried many before, and nothing has come out of it. Because of this, she doesn't do them anymore. [#5]

- When asked about technical assistance and support services, the non-Hispanic white male representative of a majority-owned professional services firm reported, "I think it is a bad thing. You're presuming that anybody in the state would have business sense to know how to handle a small business. I think that is a bad thing." [#17]

On-the-job training programs. Some interviewees felt that on-the-job training programs would be useful. Many other interviewees said that public agency programs would not be helpful in their industry or that public agencies should not play a role in this training. For example:

- A non-Hispanic white male veteran owner of a non-certified construction firm mentioned that, since he is a union company, his employees get good job training from the union. He noted that he would like to see some job training in the schools. He said, "It would be worthwhile to have training in the schools. Nothing is being done to promote construction work as a viable career." [#10]

  The same veteran business owner also pointed out that there is no place to learn his business, so they have to train them on-the-job. He noted that they like to have employees with some construction background because it is "hard and dirty work," but it pays "pretty good." [#10]

- Regarding on-the-job training programs, a Black American male owner of a specialty services firm expressed that such programs would be helpful in some industries, but that he is not sure it would be beneficial for his industry. [#16]

- When asked about on-the-job training programs, a Subcontinent Asian American owner of an MBE- and SBE-certified construction firm indicated that the union provides a very useful apprenticeship program that works like on-the-job training. [#12]

- When asked if she has used on-the-job training programs, a non-Hispanic white female owner of a WBE- and DBE-certified contracting firm expressed, "No, because all of our employees are union. They are all trained in the unions." [#55]

- When asked about on-the-job training assistance, a non-Hispanic white male representative of a majority-owned professional services firm mentioned that his company does their own training and would not be interested in state training programs. [#20]

- The non-Hispanic white female owner of a WBE-certified professional services firm reported that she is not interested in on-the-job training through the state. She noted that they have their own on-the-job training, and it is hard to find good programs. She said that she has to bring in people from outside to train her people, because what they do is so specialized. [#30]

- Regarding on-the-job training programs, the non-Hispanic white male representative of a majority-owned professional services firm commented, "I think it is a bad thing." [#17]

- When asked about on-the-job training programs, a Black American female owner of an MBE- and WBE-certified professional services firm stated, "If they're doing on-the-job training programs for primes, absolutely, to teach them how to treat and work with the subs and subcontractors. Absolutely! But we don't need it." [#65]

Mentor-protégé relationships. Many interviewees commented on mentor-protégé programs. A number of business owners said that they had informal mentor relationships. Others noted that a mentor-protégé relationship would be very desirable. [e.g., #12, #13, #16, #17, #19, #22, #26, #27, #37, #40, #50, #56, #59, #69, #70, #73, #75]

Many business owners had participated as mentors or protégés and thought this was useful. Examples include:

- A Black American female owner of an MBE- and WBE-certified professional services firm said that mentor-protégé programs are helpful, and that she used to mentor small businesses. She added, "I am a protégé." [#2]
- The Black American male owner of an MBE-certified specialty services firm reported that he has been a mentor to other businesses through a City of Indianapolis program. [#6]
- A non-Hispanic white male owner of a goods and services firm mentioned that he hoped there would be more mentor-protégé relationships because he is not very familiar with the industry. He said that typically, people will use their relatives as mentors if their relatives have been in the industry. [#25]
- The Hispanic American male chair of an Indiana minority-focused business council reported that his organization has a mentorship program for its members. He added, "It's been a nice program. We have six businesses [that have] graduated from the program." [#46]
- When asked about mentor-protégé relationships, the non-Hispanic white male representative of an Indiana small business development center stated, "I think those are very important ... I can speak from a business advisor standpoint." [#47]

  The same representative added that his organization's mentor-protégé program allows advisors to provide coaching to up-and-coming businesses that have high growth potential. He went on to comment, "We have seen tremendous results in that [program] in only a year's time." [#47]
- The Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm noted that she has participated in a mentor-protégé relationship. She said, "Oh, [I] love it." She explained that she met with her mentor once per quarter, and now they meet once a month. She said that a lot of relationship building occurs, and she finds this very helpful. [#51]
- A non-Hispanic white male representative of a majority-owned specialty contracting firm explained that he participates in a mentoring program that INDOT offers. He further explained that his firm mentors minority-owned businesses in this program. He said that his firm meets mentor program goals every year. [#54]

Some business owners described the type of assistance they would like to receive in a mentor-protégé relationship. For example:

- The non-Hispanic white female owner of a specialty contracting firm noted that she would like a mentor to help her get the WBE certification, as she has been having problems getting it set up. She commented, "I wouldn't mind somebody that'll actually help me get this WBE thing set up, because for some reason, I'm running into walls, and I'm busy." [#8]

- A Subcontinent Asian American owner of a professional services firm indicated that he would be interested in a mentor-protégé relationship for help on general business procedures and problems and not necessarily issues specific to his industry. He said, "I need to figure things out. Who would be a good person to talk to about these kinds of circumstances? The good thing is the lack of resources available forced me to think logically. Who do I go to? What doors do I knock to see what I should do?" He added that he contacted the SBA, but he wasn't able to get good answers from them. He said, "It was difficult for me to extract the right information from them or figure out who was the right person to talk to." [#21]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm pointed out that a mentor-protégé program would have been nice when they started to help them get their foot in the door with people in the industry. He noted that a mentor in the business would have been helpful to let them know what to expect and what they need to do. He said, "Just to give me an idea of what to expect." [#32]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm reported that mentor-protégé relationships would be helpful. She said, "That would be good if there is someone who can help me make contact with the right person in the government or at the transport companies or with INDOT ... that is a huge market. I just need to reach two or three people." [#36]
- When asked about mentor-protégé relationships, a Subcontinent Asian American male owner of an MBE-certified professional services firm reported, "This is relevant [for us]. That would help a small business grow." He provided an example of a large consulting firm that mentors at least three small businesses when they are awarded a contract. The mentoring, he notes, becomes part of the performance metrics for the contract. He added that programs like this would help Indiana businesses grow and could possibly bring more business to the state. [#49]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm stated that mentor-protégé relationships would be helpful for his business. He said, "I don't know if the state has any mentorship programs like the federal government does, and some of those are limited, like the [those with Veterans Affairs]. But, you can mentor with a bigger company, and they'll help you do the bonding and all that kind of stuff. That would be beneficial for small companies." [#57]
- The Hispanic American male owner of a non-certified specialty contracting firm stated that a mentor-protégé relationship would be very helpful. He added that they are very protective of their business secrets. [#62a]
- When asked about mentor-protégé relationships, the non-Hispanic white male representative of a majority-owned construction firm stated that it could be beneficial. He commented, "If the state would help forge and foster these [relationships], that would be good. Our company has been looking to establish something like this for several years, but we haven't found the right fit yet." [#66]

A few business owners had negative perceptions of mentor-protégé programs. For example:

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "It would be nice if it could be real, but it has been my experience that it is perfunctory." [#65]
- A Hispanic American female owner of an MBE- and WBE-certified professional services firm noted that everybody seems to be doing mentor-protégé relationships, but not doing them well. She said that she has done some in the past, but they have not worked out. [#7]

Joint venture relationships. Interviewees also discussed joint venture relationships. [e.g., #13, #16, #17, #19, #26, #33, #36, #37, #48, #50, #57, #64, #65, #66, #67, #69, #72] Many business owners were interested in joint venture programs:

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female stated that joint venture relationships are very good for the industry. He said that is how the state gets more experienced firms in the field. He observed, however, that there are only a handful of companies that see the benefit in this. [#3a]
- The non-Hispanic white female owner of a WBE-certified professional services firm pointed out that if you do enough networking, you will not need joint venture relationships. [#5]
- A Subcontinent Asian American male representative of a professional services firm owned by a Subcontinent Asian American female indicated an interest in joint venture relationships. He was interested if it could take the company "to the next level." He also commented that he did not have experience with joint ventures, but that he was open to it. [#9b]
- A Subcontinent Asian American male owner of a professional services firm stated that joint-venture assistance would have been helpful both when he was starting up his business as well as now. He said, "I'd love to be able to further explore those areas of interest and finance opportunities." [#21]
- The non-Hispanic white male owner of a construction firm indicated that he would be interested in joint ventures. He noted that would help him to possibly go after larger jobs. He also mentioned that he sees the state helping with joint ventures by looking at the state vendor database and alerting and pulling together various prime contractors with certain codes to go together on a project. Each company could bill separately, and there would be no need for a general contractor. [#23]
- The non-Hispanic white female owner of a construction firm mentioned that joint venture relationships would be interesting. She stated that, for her business, a joint venture would mean working with another company so that collectively they would have enough equipment to handle a job. She indicated that it would be more of a partnership with other companies on an individual project than a new business venture. [#24]

- A Black American female owner of an MBE-certified professional services firm indicated that she would be interested in joint ventures, assistance for bonding, insurance, and emerging technologies. [#29]
- The non-Hispanic white female owner of a WBE-certified professional services firm mentioned that they already work hard on joint venture relationships. However, she noted, "If the state could help us set up joint ventures, that would be phenomenal." [#30]
- When asked about joint venture relationships, a Black American owner of a specialty contracting firm reported, "I have not done that yet. It depends on who the individual is, if I would do it or not. I am looking for that now, but I haven't found the right person." [#40]
- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners reported that joint venture relationships would be helpful, and that there should be more options for those relationships. [#45]
- When asked about joint venture relationships, the white representative of an Indiana small business development center commented, "If there's a way that you could somehow ensure that you're not going to receive any manipulation on the back of those two businesses partnering together on a deal, I think it would be a good thing. My only concern would be if these businesses go on a joint venture, and there's a falling out, who would do the work?" [#47]
- On the topic of joint venture relationships, a non-Hispanic white male owner of a construction firm stated, "That's something I've been looking into recently. I'm not 100 percent either way on that. I think it has its merits if done correctly, but it could also be very bad." [#61]

Financing assistance. The study team asked business owners and managers about financing assistance.

Many interviewees thought additional assistance would be valuable for their businesses or for other businesses. For example:

- A non-Hispanic white male owner of a goods and services firm noted that financing assistance is very important. He said, "One of the first things someone says about starting a business is, 'I don't have any money.' Well, how are you going to start a business without any money? You need enough money to last you one year." [#25]

  The same business owner also reported that many people think they can go to the SBA to get a loan for their business. He said that likely will not work—they probably will not get any money from the SBA. He said, "They don't know that you have to get turned down by three different banks before you can even qualify to apply for a SBA loan, and you need assets as collateral for any loan." [#25]

- A Hispanic American male owner of a goods and services firm reported that they would be interested in financing assistance for his company to finance some inventory or new trucks. [#33]
- The non-Hispanic white representative of an Indiana small business development center stated, "I think that's huge, as far as knowing where to go for financing. There are going to be some instances where you can't get money from a bank due to credit. Then, where are you going to go?" [#47]
- A Black American female owner of an MBE- and WBE-certified professional services firm indicated financial assistance might be helpful for new businesses. [#65]
- On the topic of financing assistance, a non-Hispanic white male owner of a construction firm commented, "Financing assistance is definitely going to be an issue, and it is going to stay that way until the economy picks up or the regulations relax on banking ... one of the two." [#61]
- When asked if financial assistance would be beneficial her company, a non-Hispanic white female owner of a WBE- and DBE-certified construction firm noted, "I wouldn't need it now, but, if I was trying to start new, yes." [#55]
- The non-Hispanic white female owner of a professional services firm reported that financing assistance would be helpful for someone starting a business. She added that if there were "some sort of safety net" while a person was starting a business, that would allow for "some income stream" and could be helpful. [#68]
- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners reported that financing assistance is a big issue for their members. She went on to note that, while her organization does offer some education on this topic, more assistance would be great. [#45]
- The non-Hispanic white male owner of a construction firm noted that for financing assistance, the SBA is "pretty good." [#23]
- The Black American female owner of a WBE-certified transportation firm indicated that she has she needed more help acquiring financing so that she can expand the firm and have "more vehicles on the street." [AI#19]

Some interviewees recommended against the use of such programs. Examples include:

- A non-Hispanic white male representative of a majority-owned professional services firm commented that because his company is profitable, they do not need financing assistance. [#20]
- The non-Hispanic white male representative of a majority-owned goods and services firm commented that he is not sure if financial help for small businesses makes a lot of sense. If a small business is concerned about the financial aspect of the job, then the small business should not be bidding on the job. [#15]
- The non-Hispanic white female owner of a WBE-certified professional services firm indicated that financial assistance would not be a good idea. She stated, "It's not a good deal. Live within your means." [#56]

Bonding assistance. The study team asked business owners and managers about bonding assistance. Although many companies do not face bonding requirements or need assistance, some interviewees thought assistance would be valuable for small businesses. For example:

- A Subcontinent Asian American owner of an MBE- and SBE-certified construction firm noted that bonding assistance could be helpful. However, she said that companies must have the necessary assets. [#12]
- A Black American female owner of an MBE-certified professional services firm expressed interest in bonding assistance. She reported having an experience where she had to decline a job she had won because of the bonding requirement. [#29]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm noted that bonding assistance would be great, especially if they could make it less expensive. He stated, "That's the other thing with a bond. When you're starting out, ... [you] probably pay a bigger percent. I might pay 3.5 or 4 percent of whatever the total cost of the job is. The bigger company's probably paying 1 or 1.5 percent. That's another disadvantage of being a small business—you pay a higher rate." [#57]

Assistance in obtaining business insurance. Some business owners and managers interviewed said that assistance obtaining business insurance would be helpful to their business.

Some interviewees said that they would appreciate help regarding business insurance. [e.g., #31, #37, #40, #62a] For example:

- A non-Hispanic white male owner of a goods and services firm noted that he could use some help in obtaining workman's compensation insurance. [#31]
- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners reported that members have discussed difficulties acquiring business insurance. She went on to indicate that some members rely on referrals from other members. [#45]
- On the topic of assistance in obtaining business insurance, a non-Hispanic white male owner of a construction firm stated, "I've had a battle with it almost every year for the last 10 years ... I don't know whether it is regulations, or [if] it is motivated by the economy, but there is obviously something going on with insurance." [#61]

Some interviewees brought up the concern that health insurance is an issue for small firms. [e.g., #2, #32, #58, #69] For example:

- A Black American female owner of an MBE- and WBE-certified professional services firm stated, "It would have been great for the state to help with health insurance. We went into something of a tailspin, and for small businesses that is something that is critical for us." [#2]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated that assistance with obtaining business insurance is not necessary, but that assistance with obtaining "health insurance would be nice." [#56]

Assistance in using emerging technology. Many business owners said that assistance using emerging technology would be helpful. [e.g., #2, #9b, #13, #21, #22, #27, #37, #54, #55, #57, #58, #59, #62a, #63b, #65, #66, #69, #70] Examples of comments from the in-depth interviews include:

- A Black American female owner of an MBE-certified professional services firm stated that she could use assistance with emerging technology to upgrade her website and for electronic bidding. [#29]
- The non-Hispanic white female owner of a WBE-certified professional services firm indicated that she would be interested in IT support to help with software upgrades, updates, and new programs. She noted that she could use help in deciding what to do and what to buy. She said that she would like to have someone, or the state, to help with general technology questions, software questions, and software training. She noted that on-going training is important because technology and the software are constantly changing, and one's skills can quickly become outdated. [#30]
- Regarding assistance in using emerging technology, a Black American owner of a specialty contracting firm reported that he would use any assistance programs that helped him with emerging technology. [#40]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm reported that assistance in electronic bidding would help. [#36]
- The non-Hispanic white female owner of a non-certified construction firm reported that assistance in using emerging technology would be helpful, especially for electronic bidding. She mentioned that they get quite a few bids over the internet, and sometimes they are not that easy to respond to. [#24]
- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners reported that members have asked about assistance in using emerging technology. She reported that her organization will be providing some education in this next year. [#45]
- The non-Hispanic white representative of an Indiana small business development center stated, "I think the state needs to play a role in it, but I think it really depends on who the state's partnering with." [#47]
- The non-Hispanic white female representative of a trade organization reported that assistance in emerging technology could be helpful. She said, "We're all so backwards. We could use that." [#50]

When discussing assistance in using emerging technology, one business owner commented that it would be helpful if assistance would be made available online. The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I don't have the time to run to Indianapolis. If it were offered online and [was] something I could tap into and still be able to work, that would be great. They have a lot of luncheons and seminars and that kind of stuff. I can't take the time [off] to do it. My customers rely on me." [#56]

One interviewee indicated that assistance using emerging technology is not necessary. A non-Hispanic white male owner of a construction firm stated, "What is emerging that we need so much assistance with? Most people understand computers these days, I think." He added, "It's going to be different for every business. The internet is the only thing I see that we all have in common at this point." [#61]

Other small business start-up assistance. Some interviewees mentioned other types of business assistance.

- The non-Hispanic white female owner of a WBE-certified professional services firm indicated that on business start-up programs, most leave out the human resources function on how to hire or fire employees, employment law, etc. She said they include finance, accounting, marketing, sales, and even legal, but not human resources. She mentioned that NAWBO has new business training programs, and even NAWBO does not include a part on human resources functions. [#5]
- The Black American owner of an MBE-certified specialty services firm stated that minority-owned businesses should be aware of SBA and guaranteed loans. [#6]
- A Subcontinent Asian American male owner of an MBE- and SBE-certified construction firm stated that the City of Fort Wayne has a small business list, and contractors are encouraged to look at this list when bidding on a project for the City of Fort Wayne. However, he thinks that the list "does not have any teeth." There is nothing to encourage the general contractors to actually include those companies on their bids. He thinks a point system could be helpful, so it encourages not only the lowest bid, but also the use of disadvantaged or smaller businesses. [#12]
- A Subcontinent Asian American male owner of a professional services firm pointed out that he would like to have small business legal advice available from the state. He mentioned that he would like to have a single stream source of information that he could fully rely on about all the different legal and compliance requirements. He said, "I also called, at least a half dozen times, with questions ... to a State employment department, and they would always say, 'Leave a message.' I do that, but they call back, and I miss their call. Then, I call back, and it's the same leave a message answer." [#21]
- The non-Hispanic white female owner of a WBE-certified professional services firm commented that she would like to have legal services help. She indicated that it can be a problem when larger firms make claims against your small company and she does not have legal counsel. She said, "If I call somebody, it's going to cost me some big bucks. If the state offered some legal services that would help small businesses tremendously." [#30]

  The same owner of a professional services firm then stated that assistance to help with business development and marketing would be very helpful and is needed. She noted that marketing is a true key to growing and expanding your business, and that any assistance from the state would be welcome. [#30]
- When asked about other small business start-up assistance, a non-Hispanic white male veteran owner of a VBE-certified professional services firm reported that

having a packet of information and instructions would be good. He said, "Information on this is where you find out about things you need. These are the insurance requirements for the City or the state. Just basic information in a packet would have been a huge help... Like with insurance, we weren't aware of the amount of insurance we would need until we got our first job ... There could be a baseline chart of the minimums that you need to do business." [#32]

- The Black American owner of a professional services firm said that access or awareness of market trends could help small businesses grow. [#37]
- The Hispanic American chair of an Indiana minority-focused business council reported that education is a big component needed for small business startups. He went on to note that his organization offers educational opportunities to its members. [#46]
- The non-Hispanic white male representative of an Indiana small business development center reported that he is sure that there are other things the state can do to help small businesses. He stated, "If there's more collaboration with the resources that we already have in expanding those existing programs, I think the state would see a major return on investment." [#47]
- The non-Hispanic white female representative of a trade organization expressed that small business start-up assistance is important, and it is available. She said, "I had an SBA counselor, and it was great. It was the best thing. Everyone I know of that used the service [was] already [an] existing [company], but ... still fairly new. We have one member that is a SPARK graduate from St. Mary's entrepreneurship program." [#50]
- A non-Hispanic white female owner of a WBE- and DBE-certified construction firm stated that "knowing where to go to find projects" would help small businesses that are starting out, "because that is a learn-on-your-own kind of thing." She explained it would also help to know what prequalification a company must have for each agency. [#55]
- When asked about small business startup assistance, the representative of a Hispanic American-owned specialty contracting firm stated, "If they would or could put something together like the [Federal Business Opportunities site] ... a one-stop shopping for business opportunities, where you can go in and see if they are wanting chemicals, or wanting cleaning supplies, or [digging] ditches." [#62b]
- A Black American co-owner of an MBE-certified specialty construction firm commented, "When we started up, we got a lot of information." He explained that most of the information is online, and he still uses IDOA's website to get information. [#63b]
- A Black American female owner of an MBE- and WBE-certified professional services firm stated that having a mediator for contracts could be helpful to ensure equal treatment for all businesses. [#65]
- When asked about other business start-up assistance, the non-Hispanic white female representative of a majority-owned professional services firm indicated that

advertising would help. The same representative also reported that learning about other state rules and codes so businesses can more easily move to other states is beneficial for firms like hers. [#70]

- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm commented, "If they would have a list of all the bidding opportunities in the state or [a lot of] websites would be one ... and a list of all the agencies that small businesses need to be ... certified with, like public works, [IN]DOT, all those guys ... Unless you go out and ask them, you don't know you need to be certified to do the work until you see a bid, and you want to do it ... Then, you go out there and find out ... you [have] to jump through [hoops] and take two months [to] be certified by [IN]DOT, and the job's already bid out." [#57]

Information on public agency contracting procedures and bidding opportunities. Some business owners reported that state agencies already do a good job providing information about bid opportunities. Many interviewees indicated that more information on public agency contracting procedures and bidding opportunities would be helpful. [e.g., #1, #11, #23, #30, #33, #40, #50, #55, #57,#70, #71a, #74] For example:

- The non-Hispanic white female owner of a specialty contracting firm stated that she would like information on bidding opportunities, on-line registration as a bidder, pre-bid conferences, and a list of prime bidders. She indicated that those four changes could help her generate more business. [#8]
- The Hispanic American owner of an MBE-certified construction firm reported, "It might be nice if they had a list of contractors that they would send out an email notice [for opportunities]." [#13]
- A Black American female owner of an MBE-certified professional services firm indicated interest in most of the contracting process changes that would allow her to take advantage of bidding opportunities, registering as a bidder, information on potential subcontractors and prime contractors, state vendor fairs, and pricing and contracting benefits as a small and minority-owned business. [#29]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm mentioned that it would be good to know what is going on with State bidding opportunities. She said, "I would like to know, who are the prime contractors that are bidding? How can I place myself in front of them that they can contact me for a bid? I have contacted them in the past and have not received any notice back. But they are big contractors ... All I would need is one or two big contractors." [#36]
- The non-Hispanic white male owner of a specialty contracting firm reported that it would be helpful if jobs were posted online so that small firms can look at all of the relevant jobs and bid on jobs they can perform. He added that this would be helpful for his company "so we can look at the job and see if it is a good fit for us. A lot of times, we hear after the fact." [#60]
- A Black American male owner of a professional services firm indicated that he would like information on public agency contracting procedures and bidding

opportunities. He said, "I would love to have some of that ... Tell me how to get it." [#67]

Online registration with a public agency as a potential bidder. Most owners and managers of construction companies said that online registration with public agencies would be helpful. [e.g., #7, #9b, #11, #12, #16, #17, #19, #22, #24, #27, #30, #36, #40, #47, #48, #55, #56, #57, #59, #61, #62b, #63a, #64, #65, #66, #68, #70, #71a, #74] For example:

- The non-Hispanic white male representative of a majority-owned goods and services firm reported that online registration with a public agency as a potential bidder would be a "great, easy way for everyone to be on the same playing field to start with." He further explained that most of the bids he gets are because he had set himself up to receive those bids prior to the bid request being released. [#15]
- A non-Hispanic white male representative of a majority-owned professional services firm mentioned that online registration would be good provided it came to the company rather than the individual. He noted that he wanted to register as his company name rather than his personal name because people change all the time and he would want the emails to go to a company email address. [#20]
- The non-Hispanic white male owner of a construction firm stated that he has registered online with the state but all he has gotten are bids outside his area of expertise. He also noted that he has received some project notifications from a person in southern Indiana with the United States Forest Service that got his name from the state listing. [#23]
- A Hispanic American male owner of a non-certified goods and services firm reported he is interested in online bidder registration. He said that they have tried it before without success but would try it again. He noted that it would be good if the state could offer assistance to businesses on how to walk through the process of getting registered and getting in the pool of bidders. [#33]
- The Black American male owner of a professional services company expressed that online registration would help. He went on to note that simplicity is important, because many small businesses do not have employees that are technology-savvy. [#37]
- When asked about online registration with a public agency as a potential bidder, a Hispanic American owner of a professional services firm indicated that he would benefit from something like that in the public sector. He added that for the private sector work, he is "part of a portal and uses that to find subs." [#38]
- When asked about online registration with a public agency as a potential bidder, a Black American male owner of a professional services firm responded, "Great. Tell me how to do it." He said that he has not used it in Indiana. [#67]
- The non-Hispanic white male owner of a construction firm pointed out that the IN.gov website is confusing, and that the pages do not work or are not updated. [#75]

Hardcopy or electronic directory of potential subcontractors. Most interviewees said that hard copy or electronic lists of potential subcontractors would be helpful. [e.g., #9b, #13, #16, #17, #19, #23, #27, #36, #37, #40, #47, #48, #57, #59, #62a, #64, #65, #70, #71a] Examples of interviewee comments include:

- The non-Hispanic white male representative of a majority-owned professional services firm reported that they do not have a hard copy or directory of potential subcontractors. He commented, "That would be a wonderful thing." [#11]
- The non-Hispanic white female owner of a WBE-certified professional services firm mentioned that she would be interested in a directory of subcontractors, but they would need to develop a relationship with any subcontractors before they would use them. [#30]
- A Hispanic American male owner of a professional services firm commented that he has access to lists through the portal for private sector work, and that he would benefit from similar list access for public sector work. [#38]
- On the topic of hard copies or electronic directories of potential subcontractors, the non-Hispanic white male representative of a majority-owned construction firm commented, "Electronic [directories] would be good." [#66]
- A non-Hispanic white female representative of a majority-owned specialty construction firm reported that a hard copy or electronic directory of potential subcontractors would be "fantastic." She added, "It would be nice, especially with the municipalities mandating, 'We would like this percentage MBE, [and] we would like this percentage WBE.' It would almost be nice to see that list be somehow prequalified." [#44]

Pre-bid conferences where subcontractors can meet prime contractors. Many business owners and managers supported holding pre-bid conferences. [e.g., #3a, #5, #9b, #10, #11, #13, #16, #17, #19, #20, #21, #22, #23, #24, #27, #28, #30, #42, #47, #48, #57, #58, #59, #61, #63b, #64, #65, #66, #70, #71a, #72, #74, #75] For example:

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female stated that the agencies do not do enough pre-bid conferences. He would like to see more interaction between prime contractors and subcontractors. [#3a]
- The Black American male owner of an MBE-certified specialty services firm reported that pre-bid conferences are beneficial because sometimes the primes are not aware of smaller MBE and WBE companies. He said that a lot of information is shared, and "good ol' boy" network contractors now know where to go for help on goal requirements with MBE and WBE companies. [#6]
- When asked about pre-bid conferences where subcontractors can meet prime contractors, a Subcontinent Asian American owner of an MBE- and SBE-certified construction firm stated, "That's a good idea, but I don't know how many people would have the time. I mean, when a project comes out to bid, there's always a pre-

bid meeting, and there are a lot of folks that don't make those. When business is hopping, no one has the time." [#12]

- The non-Hispanic white male representative of a majority-owned construction firm commented that he liked the idea of pre-bid conferences, even if they are in Indianapolis. However, he went on to note that the location could be a barrier. [#35]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm indicated that they had planned on going to pre-bid conferences, but many times work gets in the way. She likes the idea of pre-proposal conferences, but it requires them to be out of the office. She said, "It should be a good place, because you meet a lot of the potential bidders and people who are involved." [#36]
- The Black American owner of a professional services firm commented that pre-bid conferences "can be helpful," but noted that they are not always easy for new business owners to access. [#37]
- When discussing pre-bid conferences where subcontractors can meet prime contractors, a Black American owner of a non-certified specialty contracting firm explained that such things would be a great opportunity for "rubbing elbows." [#40]
- Regarding pre-bid conferences where subcontractors can meet prime contractors, the Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm indicated that she has attended many pre-bid meetings, and that it was great for building relationships. [#51]
- A non-Hispanic white female owner of a WBE- and DBE-certified construction firm stated that she attends pre-bid conferences, and she finds them to be helpful. In addition, it helps get the company name and face out in the community. [#55]
- When asked about pre-bid conferences where subcontractors can meet prime contractors, the Hispanic American male owner of a specialty contracting firm stated that they would be beneficial. He added, "If you are going to be doing work with somebody ... whether you're the prime or the sub, you want the relationship." [#62a]

One interviewee indicated that pre-bid conferences are not as helpful as they were in the past. The Hispanic American female owner of an MBE- and WBE-certified professional services firm reported that at first, the pre-proposal conferences were helpful. However, she went on to indicate that they are no longer as beneficial to her firm. She commented, "Back then, the primes would show up, and you could ask them questions. Now, that's not so much the case." [#7]

Distribution of lists of plan holders or other lists of possible prime bidders to potential subcontractors. Most of the business owners and managers interviewed supported the distribution of plan holders lists. [e.g., #7, #9b, #13, #17, #23, #31, #36, #40, #41, #47, #51, #57, #58, #59, #62b, #65, #66, #72, #75] Examples of comments include:

- A Subcontinent Asian American owner of an MBE- and SBE-certified construction firm stated, "Oh yeah. Definitely. If we knew all the generals and everyone who was bidding, and had a place to send our number to, contact information." [#12]
- When asked about distribution of lists of possible prime bidders, the Black American owner of a non-certified professional services firm commented, "Making those readily available would be advantageous." [#37]

Other agency outreach such as vendor fairs and events. Some business owners and managers reported that outreach such as vendor fairs and events were useful, while others no longer regularly attend those events.

Many interviewees supported agency outreach such as vendor fairs and events. [e.g., #6, #12, #55, #57, #62b] Examples of positive comments about agency outreach events include the following:

- A Black American female owner of an MBE- and WBE-certified professional services firm reported that she is interested and attends events at Purdue and IDOA. [#2]
- The non-Hispanic white female owner of a WBE-certified professional services firm mentioned that agencies set up information fairs and MBE and WBE vendors can go and meet and mingle with the agencies. She said that she feels this is a good idea. [#5]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm reported that the meet and greets are of interest, but the timing is bad for them. They said that some larger companies have business development people who can make these meetings, but they don't have someone like that. [#32]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm reported that she has done vendor fairs and will probably keep attending. She commented that when you meet someone, and they do not return your calls or emails, it is discouraging. However, she went on to mention that this still the best way to reach people. [#36]
- The Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm said that IDOA outreach is "phenomenal," and they provide information on their events, pre-bids, offer walkthroughs, and a directory. She said that the City of Indianapolis and the Marion County Public Library also conduct outreach activities and events. [#51]
- The non-Hispanic white female representative of a majority-owned professional services firm commented that outreach and vendor fairs "would be absolutely beneficial to [the firm]." [#70]

A number of business owners and managers indicated that outreach events were not useful for their companies. [e.g., #7, #13, #15, #23, #30, #56, #64] Examples of comments include:

- The non-Hispanic white female owner of a WBE-certified goods and services firm indicated that her firm has attended some vendor fairs in the past but never noticed

a lot of result, so she stopped going. She added that state employees are required to attend the fairs and do not appear to be interested in developing relationships with new vendors. [#1]

- A non-Hispanic white male veteran owner of a non-certified firm reported that vendor fairs would not be of much interest to him now. He noted that he used to go to them when he was starting out, but now that his company is established, he does not attend them. [#10]
- The non-Hispanic white female representative of a majority-owned construction firm reported that she does not see vendor fairs making a difference. She added, "Especially in [our area], there are only so many vendors." [#14]
- When asked about vendor fairs, a Hispanic American owner of a specialty contracting firm expressed, "I've gone to a couple of local ones to find out about bringing in some interns in [the] summers ... but in every instance, they were always temporarily available and always interested in electronics." [#41]
- A Black American female owner of an MBE- and WBE-certified professional services firm noted that agency outreach, such as vendor fairs and events, is good for many companies. However, she reported that she stopped attending them about five years ago. She further stated, "I don't like these because everybody's in the room. You've got 25 other ... companies in there. That person that is the buyer, not unless you come in with a raincoat on and nothing underneath, he is not going to remember you." [#65]
- When asked about agency outreach and vendor fairs, a Black American male owner of a non-certified professional services firm reported, "I have not [been to any]. I am aware of them." He further explained, "I haven't seen business come out of them." He said members of his company like to attend business conferences because they get to meet the decision-makers at that time. [#67]

Streamlining or simplification of bidding procedures. Some interviewees indicated that streamlining or simplification of bidding procedures would be helpful. [e.g., #35, #36, #40, #45, #47, #51, #59, #61, #63a, #64, #65, #66, #70, #73, #74, #75]

- Regarding streamlining or simplification of bidding procedures, the non-Hispanic white male representative of a majority-owned goods and services firm indicated that it would be beneficial if there was some consistency in bidding processes across the state rather than cities doing things differently and requiring dissimilar things. He added that small businesses have a hard time researching different procedures for public bidding in different cities. [#15]
- The non-Hispanic white female owner of a WBE-certified professional services firm mentioned that she would like the bidding procedures to be simplified by having the clients ask for bids from fewer vendors or just those they would truly consider. [#30]
- A non-Hispanic white male representative of a majority-owned specialty contracting firm explained that, while streamlining bidding procedures would be

good, he believes it is going the opposite direction. He said that because of insurance and risk management requirements, it is getting more difficult. [#54]

- A non-Hispanic white female owner of a WBE- and DBE-certified construction firm stated that streamlining the bidding procedures would definitely make it easier on companies bidding for jobs. She added that it would be easiest if it were defined and, "if there is any federal money, this is what the form has to look like. If there is any state money, this is what you have to include," because everywhere you go, you have to include different information. [#55]
- Regarding streamlining or simplification of bidding procedures, a Black American owner of a professional services firm indicated, "Nothing I've seen has been streamlined." He said that there was a lot of paper, and things could not be emailed, which made it harder. [#67]

Breaking up large contracts into smaller pieces. The size of contracts and unbundling of contracts were topics of interest to many interviewees.

Most business owners and managers interviewed indicated that breaking up large contracts into smaller components would be helpful. [e.g., #6, #9b, #12, #18, #19, #20, #21, #22, #23, #24, #27, #35, #36, #37, #40, $8, #49, #55, #56, #57, #59, #60, #62a, #63b, #65, #71a, #74] Examples of interviewee comments include:

- The Hispanic American male owner of an MBE-certified construction firm stated that small companies could have difficulty with the really large projects. He stated, "Sometimes, if they would break those out into separate contracts, it would get more bidders on them, because more people would be able to get the bonding for it. If you have a small piece of the pie, you don't have to bond the whole pie." [#13]
- When asked about unbundling contracts, a Black American male owner of a specialty services firm expressed that it would be nice if the contracts were broken up into smaller pieces. This would allow a firm like his to be able to get the work as a prime contractor and not be a subcontractor. [#16]
- A Hispanic American male owner of a goods and services firm reported that he would be interested in unbundling projects so small businesses could handle them. [#33]
- The representative of a professional services firm owned by a Subcontinent Asian American male reported that unbundling contracts would be helpful because it would allow small companies the ability to work on them. He added that unbundling would help smaller firms like his because the large contracts often exclude them. [#42]
- The non-Hispanic white female representative of a trade organization stated that unbundling, when it comes to materials, would be great. She noted that South Bend has a great way of doing it. The City breaks the contracts down into smaller pieces. [#50]

- The Hispanic American female owner of a specialty services firm explained that unbundling is "critical for small companies." She commented that, otherwise, the contracts can be too large in scope to handle. [#51]
- The Subcontinent Asian American male owner of a goods and services firm commented that for other firms like his, it would be beneficial to have many small bids versus one giant contract. If a giant contract was broken up, the smaller contracts would be easier for a small business to handle the workload. [#58]

A few business owners saw both positive and negative aspects of unbundling contracts. For example:

- Regarding breaking up large contracts into smaller pieces, the non-Hispanic white male representative of a majority-owned goods and services firm commented that it is a "catch-22." He went on to explain that unbundling a contract would not be advantageous to the company that would be awarded the whole contract, but would be better for a small company that might not otherwise get a contract. [#15]
- The Black American male owner of a professional services firm expressed that breaking up large contracts into smaller pieces would be helpful because it would make the jobs "bite-size." However, he noted that there could also be some risk in making the process and jobs too complex. [#37]
- A non-Hispanic white male owner of a construction firm reported, "There are advantages and disadvantages with [unbundling contracts]. Sometimes, the prime is not the best person to handle a smaller part. That is very true in my industry." He continued, "But sometimes, the prime is trying to micromanage that part of the job along with the rest of it." [#61]

A few business owners did not believe unbundling contracts would be helpful or could happen. [e.g., #7, #20] For example:

- The non-Hispanic white female owner of a WBE-certified goods and services firm indicated she believes that unbundling contracts does not work. [#1]
- The non-Hispanic white female representative of a majority-owned construction firm stated that she does not like to see projects unbundled. It creates many contracts and becomes difficult to know who to go to when there are questions. She said, "I have seen [unbundling] make it worse than better. It does give more people an opportunity, but it also makes it more difficult to do the project." [#14]
- The non-Hispanic white female owner of a WBE-certified professional services firm noted that breaking contracts into smaller pieces is not really an advantage for her firm. [#30]
- A non-Hispanic white male representative of a majority-owned specialty contracting firm stated that INDOT has fewer employees than in the past. The State is actually bundling jobs together. He added that unbundling cannot happen since INDOT does not have the resources to manage multiple contracts. [#54]

Price or evaluation preferences for small businesses. Some interviewees had comments related to price or evaluation preferences for small businesses. [#24, #27, #30, #31, #33, #36, #56, #59, #63a, #65, #68, #74] There were a variety of views on use of price or evaluation preferences for small businesses:

- When asked if price or evaluation preferences for small business would be helpful, a Black American owner of an MBE- and DBE-certified certified specialty contracting firm responded, "I would really, really love that." [#48]
- A Black American owner of a specialty contracting firm said, "If you are a small business starting out, you should get the opportunity to be helped out in the beginning to get established." The business would then graduate out of the program. [#40]
- When asked about price or evaluation preferences for small businesses, a non-Hispanic white male owner of a non-certified construction firm commented, "I would have to say I like that. The State of Indiana has always offered to businesses that are based in Indiana and qualify for the small business exemption ... the ability to take off a little of the percentage on your price to be more competitive." [#61]
- When asked about price or evaluation preferences for small businesses, the Hispanic American owner of an MBE-certified contracting firm stated, "I don't know about small business, but I would say local business. In fact, I sent an email to Senator Long this year about coming up with a deal to give preferential treatment to local business." [#13]
- The non-Hispanic white female owner of a WBE-certified goods and services firm reported that price or evaluation preferences for small businesses is not a good idea and not necessary. She said, "This is almost an insult. It says, 'Okay, you're a small bidder, you're a small company, you can't possibly do as good a job or get as good a price.' In my industry that's not necessarily true." [#1]
- When asked about price or evaluation preferences for small businesses and small business set-asides, the non-Hispanic white male representative of a majority-owned construction firm stated, "I don't know how you'd do this. The fallacy is that this helps. What really happens is they team with a larger contractor, so you are not actually getting what you think you are getting." [#66]

Small business set-asides. The study team discussed the concept of small business set-asides with business owners and managers. That type of program would limit bidding for certain contracts to firms qualifying as small businesses.

Many business owners and managers supported small business set-asides. [e.g., #9b, #13, #21, #22, #24, #25, #28, #30, #31, #32, #33, #36, #40, #47, #49, #57, #59, #65, #74] Examples of interviewee comments include the following:

- The non-Hispanic white male representative of a majority-owned construction firm commented that having small business set-asides where only small businesses could bid on the projects would be of interest to him. [#35]

- When asked about small business set-asides, the representative of a Hispanic American-owned specialty contracting firm responded, "Those are always wonderful." [#62b]
- A Black American male owner of a professional services firm expressed that small business set-asides are "great if you build a set-aside that makes a difference, like the entire segment of the [job]." He also commented that a Black American-owned firm will take the job due to a set-aside if it is available, and that he would want to learn and gain experience from it. [#67]
- The Black American male owner of a professional services firm expressed that small business set-asides would be important when "managed in [a] way that is only intended to help businesses get up and function." He went on to say that there should be a strategy in the program that allows them to be "weaned off of [it]." [#37]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm reported that the state needs to have veteran set-asides for combined state and federal projects, such as all the I-69 work. He noted that if a project is all federal- or all state-funded then it has veteran set-asides. He mentioned that if it is a combined state and federal project, then it has minority- and woman-owned business set-asides but no veteran set-asides. He said that this negatively affects his business. He said, "When you figure all the billions spent on I-69, and there were no three percent set-asides for veterans, it's a real slap in the face ... If there is any federal money attached to it, there is no veteran set-asides tied to it. It has to be 100 percent funded by the State of Indiana to have a veteran set-aside." [#32]

Some business owners and managers expressed concerns about small business set-asides. [e.g., #1, #20, #23] Examples of those comments include the following:

- The Black American male owner of an MBE-certified specialty services firm pointed out that he does not like set-asides, especially minority- or woman-owned business set-asides. He mentioned when there are set-asides, it taints the whole program, and people feel that the state is paying a premium. He said that it can create ill-will toward the small, minority-, or woman-owned business. He noted that there is a lot of resistance to set-asides, and that he would like everyone to have a chance to bid on projects. [#6]
- A non-Hispanic white male veteran owner of a non-certified construction firm reported that he is not in favor of MBE or WBE set-asides or preferences because it is against free trade. He stated, "If you look at it, it gives a certain segment of our population an advantage." [#10]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "There are specific set-asides from the federal government that are set aside for small businesses. In some cases, you can only be small once, because the set-aside is so big that once you get it you are no longer small." [#17]

Mandatory subcontracting minimums. Some interviewees supported the requiring of a minimum level of subcontracting on projects [e.g., #9b, #12, #17, #21, #30, #31, #36, #40, #47, #49, #51, #59, #65, #74]. Other interviewees did not.

Examples of comments in support of a mandatory subcontracting minimum program include the following:

- A Black American female owner of an MBE- and WBE-certified professional services firm indicated that mandatory subcontracting minimums would be helpful. [#2]
- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female stated that he thinks mandatory subcontracting minimums should absolutely be in place. [#3a]
- A Black American owner of an MBE- and DBE-certified specialty contracting firm reported that, while mandatory subcontracting minimums would be beneficial, agencies would need to enforce them. [#48]

Some interviewees did not like the idea of mandatory subcontracting minimums or did not think it would be effective. [e.g., #20, #25, #66] For example:

- The non-Hispanic white female owner of a non-certified specialty contracting firm stated that she was unsure of whether she supported mandatory subcontracting minimums. She stated, "I hate to tell people how to do their job. I just like them to consider me and to know I'm here, and if they don't like me, they don't have to use me." [#8]
- The Hispanic American male owner of an MBE-certified construction firm indicated that he would not like to see mandatory subcontracting minimums. He stated, "No. I'm thinking of it from the public standpoint. If you have to have minimums, what would that do to the competition? You're eliminating competition by saying, 'Okay, this portion has to go to this small segment here.' I don't think eliminating competition is ever a good thing." [#13]
- The non-Hispanic white male owner of a construction firm commented that mandatory subcontracting minimums are not a good idea. He noted that you may have to use someone just because they are a minority-, woman-owned, or small business, and they may not be qualified. [#23]

Small business subcontracting goals. Interviewees discussed the concept of setting contract goals for small business participation.

Many business owners and managers indicated that small business subcontracting goals would be helpful. [e.g., #2, #21, #31, #36, #40, #49, #59, #64, #65, #74] Examples of comments include:

- A non-Hispanic white female representative of a majority-owned specialty contracting firm stated, "I think it depends on how the goals are written. Good faith estimates and things like that, I think are great, and it makes us more cognizant of

who we're getting bids from ... Hopefully, it gives us opportunities to work with people [who] maybe we haven't worked with before." [#44]

- The white representative of an Indiana small business development center reported that small business subcontracting goals would be helpful for small business owners. [#47]
- When asked about small business contracting goals, the non-Hispanic white female owner of a WBE-certified professional services firm stated, "It would help the small businesses grow." [#56]

Some businesses indicated that small business subcontracting goals would not be desirable. For example:

- A Hispanic American female owner of an MBE- and WBE-certified professional services firm expressed that, as a prime contractor, she already has to find minority-and woman-owned business, and she doesn't want to have another group to have to find for a subcontractor goal. [#7]
- A non-Hispanic white male representative of a majority-owned specialty contracting firm commented that small business contracting goals do exist, but only for designated DBE firms. There are no stipulations on the amount of money the disadvantaged business charges for services and some of the DBE firms charge so much for services that prime contractor firms cannot afford to hire them. [#54]

Formal complaint and grievance procedures. The study team discussed procedures for making complaints or outlining grievances. There were a number of wide-ranging comments, including those who find procedures helpful. [e.g., #19, #21, #27, #55, #56, #62b, #64, #66, #70, #74] Examples of such comments include:

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female reported there should be a formal complaint and grievance procedure in place, one that "has teeth." He added that there currently is not much that the state can do to enforce rules. [#3a]
- The Black American male owner of an MBE-certified specialty services firm indicated that he did not have any problems with the complaint and grievance procedures, but he felt that some small minority- and woman-owned businesses may be intimidated by the process and may not want to complain for fear of losing business. [#6]
- The non-Hispanic white female representative of a majority-owned construction firm reported, "It would be nice if they had a formal complaint and grievance procedure." She added that a complaint normally ends with the company with which the firm is working. A firm can file a complaint, but if the amount of money is high, the attorney fees would make it not worth it, especially for a small firm. [#14]
- A non-Hispanic white male representative of a majority-owned professional services firm remarked that formal complaint and grievance procedures would be

beneficial. He added, "If it ever happened, it would be nice to know what to do." [#20]

- A Black American male owner of an MBE-certified specialty contracting firm stated that as a small business, you want to be careful about complaining about the state. However, he did say it would be nice to have complaint procedures if you needed them on another company. He said that he was not aware that complaint and grievance procedures were even available now from the state. [#22]
- The Black American owner of a professional services firm stated that formal complaint and grievance procedures would be "good, if done with some spirit." He added that there must be more than just "checking the box," or "real change won't take place." [#37]
- In reference to complaint and grievance procedures, the non-Hispanic white male veteran owner of a SDVOSB-certified construction firm stated, "That would be something good to have. I'm not sure if it's in the state contracts, where they have some kind of committee or something to settle complaints versus having to go through a lawsuit type of deal where they have arbitration committee or something." [#57]
- A Black American female owner of an MBE- and WBE-certified professional services firm reported that formal complaint and grievance procedures are a big issue, and that formal procedures are important. She stated, "I really do believe that the primes think they have free rein. They are rogues now. They can do anything they want to do. The departments go along with it because they have a vested interest." [#65]

J. Insights Regarding the MBE/WBE and DBE Program or any other Race-/Ethnicity- or Gender-based Measures

Interviewees, participants in public hearings, and other individuals made a number of comments about race- and gender-based measures that public agencies use, including MBE/WBE and DBE contract goals and comments regarding:

- Indiana state agencies, public colleges, or other public agency MBE/WBE/DBE subcontracting goals programs *(page 154)*;
- Any other Indiana state agencies, public colleges or other public agency programs *(page 157)*;
- Any issues regarding Indiana state agencies, public colleges, or other public agency monitoring and enforcement of its programs *(page 158)*;
- Any adverse effects of programs on businesses not eligible for the program *(page 161)*; and
- Any MBE/DBE or supplier diversity programs in the local private sector *(page 162)*.

Indiana state agencies, public colleges, or other public agency MBE/WBE/DBE subcontracting goals programs. Interviewees reported their awareness and experience with public agencies' programs.

Some reported benefitting from MBE/WBE or DBE contract goals, or expecting to benefit. A number of businesses described their experiences:

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female explained that the firm has done private sector projects and public work projects, but they have more opportunities for public work projects because of the MBE and WBE designation and other certifications. [#3a]
- A non-Hispanic white male representative of a majority-owned professional services firm stated that he knows two other businesses with whom they have partnered in the past that are minority- and veteran-owned. He added that he has seen those companies have success with these programs. He went on to note that his company wants them to be successful, and that he does not think they would find the same success without these programs. [#72]

One reported both favorable and unfavorable experiences regarding race- and gender-based programs. For example, the Black American male owner of an MBE-certified specialty services firm stated that he "loves" the mandatory subcontracting minimums or goals and believes they could go higher. He indicated that he feels the state needs to put more "teeth" into its goal requirements. He said, "The City of Indianapolis is exceeding their goals. So that means the state could exceed their goals too." He reported that the state used City of Indianapolis goals for the Convention Center and Lucas Oil Stadium and exceeded them. Therefore, he wonders why the state cannot do that all the time. [#6]

The same interviewee indicated that the state could do more to meet MBE/WBE goals. He said, "They could put more 'teeth' into meeting or exceeding their goals on the individual projects." He mentioned that the City of Indianapolis is 15 percent MBE, 8 percent WBE, and 3 percent VBE on goals and is exceeding its goals. He stated that the state should work on meeting their goals and even making them higher and push the contractors to meet the goals as the City of Indianapolis does. He added that the state should encourage contractors to meet the subcontracting goals, and if they do not, it should affect that business' future in working with the state. He said that, alternatively, the contract cannot get signed unless the goals are met. He said that the City of Indianapolis does this, so the state could do it too. [#6]

The same interviewee went on to report that the state may consider awarding more points for meeting or exceeding MBE and WBE participation goals on contract proposals in the bidding process. He urged that the state make suggestions to prime contractors about MBE and WBE companies to consider when putting together their proposals. [#6]

Some interviewees felt that race- and gender-based programs were little to no help to them, even though they participate in them. For example, some reported limited value from certification, because of limited opportunities:

- The non-Hispanic white female owner of a WBE-certified professional services firm pointed out that she is certified as a WBE and that people do notice the designation that she is certified. However, she said that she does not feel that it has really helped her. She reported that she still maintains the certification and renews it because she does not want to go through the whole process from start again. She mentioned that it is a very time-consuming and intensive process. When asked about the certification, she said, "Because I have it, I keep it. But it hasn't really been beneficial. The jobs aren't there." [#5]
- A Black American male owner of an MBE- and DBE-certified specialty contracting firm reported that race- and gender-based programs have not been helpful for his firm. He commented, "I do everything I am supposed to do and still get no work." [#48]

  The same business owner went on to report that while the programs are a positive thing, "All the work I ever got was [through] word-of-mouth." [#48]
- The Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm stated that she has not used her certification for anything. She thinks it is a very disappointing certification because she cannot seem to use it to generate interest. [#51]
- The Subcontinent Asian American male owner of a non-certified goods and services firm commented that he did not see a reason to classify as a minority or to be certified. He went on to comment that his company might be too small for consideration in the first place. [#58]

Some interviewees had limited knowledge of race- and gender-based programs. For example:

- A non-Hispanic white male representative of a majority-owned professional services firm was not aware of Indiana state agencies or public colleges having MBE/WBE/DBE subcontracting programs. He added that he was not aware of DBE subcontracting programs at INDOT or the Indianapolis Airport or MBE/WBE or supplier diversity programs in the local private sector. [#20]
- The non-Hispanic white female owner of a construction firm stated that she was not aware of state agencies or universities having MBE or WBE subcontracting programs. [#24]

  The same business owner noted that she had heard of the Federal DBE program, but that Vigo County did not qualify for it. She said, "If I move north or south, I may qualify." [#24]
- A Black American male owner of an MBE-certified goods and services business indicated that he would be most interested in public colleges' MBE and VBE programs. He stated that he was not aware that state agencies or colleges had such programs. [#27]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm commented "I probably don't know what help is out there." [#73]

- The Hispanic American male owner of a non-certified specialty contracting firm stated that he knows some companies have race-/ethnicity-conscious programs. However, he is not familiar with them and how they work. He also noted that the federal government has some subcontracting goals programs. [#62a]

Some interviewees were critical about key aspects of the implementation of the State MBE/WBE Program or the Federal DBE Program. For example:

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female stated that the perception in the marketplace is that you are not a minority unless you are Black American. He reported that the requests for bid will name Black American-owned firms as minority-owned firms when there is a minority requirement. The Hispanic American firm is not named, and he believes it is because the perception in the State of Indiana is that minority firms are Black American, not Hispanic American or Asian American. [#3a]

  The same representative also said that the federal government says firms have to have certification in these codes to do the work, but nobody checks to see if the subcontractor has certification in the appropriate DBE NAICS or IDOA UNSPSC codes to fit the capacity. In other words, having certification in these codes does not separate this firm from other firms because the prime contractor does not check the certification codes. [#3a]

- The Hispanic American owner of an MBE-certified construction firm stated, "What we found, in one instance anyway, is the state has minority goals set up on a lot of projects. And we found that it is not a program for prime contractors, it is a program for subcontractors. We did have an opportunity to bid on an INDOT project, which for first go-round, we were the successful low bidder. And they said, 'Well, you need 'X' amount of minorities.' I said, 'I am. I am 100 percent [a] minority business.' [They said,] 'Well, you don't count.' So, it is strictly for subcontractors. So, I argued with them. Once a minority contractor gets big enough to do work themselves, they no longer count as a minority contractor towards the goals. I thought that was ridiculous. But, that's the way the program's set up." [#13]

Some firm owners and managers provided recommendations for the State of Indiana MBE/WBE program or Federal DBE Program or advice for other MBE/WBE/DBEs. For example, responses ranged from wanting a greater return on investment; more emphasis on program graduation; or in one case, an end to race and gender programs:

- A Black American female owner of an MBE- and WBE-certified professional services firm indicated that she wanted to see the return on investment for being certified. She questioned why a firm would get certified if there is a negative return on investment. [#2]

- A Subcontinent Asian American owner of an MBE-certified professional services firm commented, "I really recommend you put a cap on [the] graduation of MBE. There [have to] be so many years. Why do you need an MBE certification if you are

doing $10 million in business?" He added, "I would recommend a nine-year term like the Federal Government, and all based on a revenue goal." [#49]

- The non-Hispanic white male owner of a construction firm stated, "I think it's wrong to do a lot of that. I think business should be open to qualification and not race and gender or anything else. People should be hired by what they know, not who they know or what color their skin is." [#75]
- The non-Hispanic white female representative of a trade organization indicated that many of her members are not that knowledgeable about the various disadvantaged business programs available. Her members know they exist; but until they can be certified, it does not mean that much to them. [#50]

Some had comments on others programs, including small business and veterans programs. For example:

- A Black American female owner of an MBE- and WBE-certified professional services firm noted that the federal government has similar programs. She earned SBA (8a) status, but then was out of the program quickly because she exceeded the limit. [#65]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm mentioned that he would like to see the veteran set-aside available on combination federal and state projects. He pointed out that, right now, if an INDOT project has both federal and state money, then there is no veteran set-aside, and most of the INDOT projects have combined funding. He said, "It's only the veterans they do that with. They don't do that with minorities or women. It's on the veterans." [#32]

Any other Indiana state agencies, public colleges or other public agency programs. Interviewees had comments regarding other public agency programs they had experienced. For example:

- The Black American male owner of an MBE-certified specialty services firm reported that he feels that the universities do a good job of alerting people to their MBE and WBE subcontracting goals programs. He mentioned that all the universities have a panel forum at Black Expo, and that Purdue has a minority- and woman-owned business event every November. He said that these events give businesses a chance to meet all the construction and purchasing directors at the universities. [#6]
- The same interviewee also pointed out that many MBE and WBE companies do not take advantage of the events put on by the state and the state universities. He said the state and universities put on programs with all of their purchasing directors and only ten people may show up. He noted that the events are well publicized ahead of time, so he feels that many MBE and WBE companies are missing these opportunities and have themselves to blame. He did note that the WBEs do a much better job of attending than the MBEs. [#6]

- The Black American owner of a professional services firm said that some diversity ordinances "create the illusion of trying to do something. However, [it] doesn't cause real change." [#37]
- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners stated, "I would love to see all of these programs collaborate. We all offer similar things. We should all work closely together. We have the same goals, to increase business overall, just for different groups." [#45]
- The Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm indicated an interest in IAA, and she has heard about contracting goals for minority-owned firms. When she has tried to get feedback, she cannot get it. She would like to know more about job references, resumes, and qualifications. [#51]
- The non-Hispanic white female owner of a WBE-certified professional services firm noted that the casinos have programs to work with women. She stated, "Usually, it's if they acquire a grant through the state that requires them to use a minority business." [#56]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm noted that there is a disabled veteran program. He stated that most of his contracts that he has gotten through the federal government did not have anything to do with his veteran status. [#57]

Any issues regarding Indiana state agencies, public colleges, or other public agency monitoring and enforcement of its programs. Some interviewees had comments regarding the implementation of the MBE/WBE or DBE Program, including false MBE/WBE or DBE reporting by prime contractors or abuse of "good faith efforts" processes, "fronts," and "pass-throughs."

False reporting of MBE/WBE/DBE participation or falsifying good faith efforts. Some public agencies in Indiana set MBE/WBE/DBE contract goals on certain projects. Prime contractors can meet the goals through subcontracting commitments or show good faith efforts to do so. The study team asked business owners and managers if they know of any false reporting of MBE/WBE/DBE participation, or falsification of good faith efforts submissions. [e.g., #7, #45, #32]

- A Native American owner of a non-certified construction firm stated, "There is no 'good faith' in this industry. It's all about money and [the] bottom line." [#71a]
- The non-Hispanic white female owner of a WBE-certified professional services firm reported that she is aware of companies that list WBE companies as subcontractors, but have not even contacted them about it. She added that she knows of times when WBE companies are listed in the RFP for a certain percentage of the work but then are not used on the project. [#5]
- Regarding false reporting or abuse of "good faith efforts" processes, the Hispanic American owner of an MBE-certified construction firm stated, "The one thing I did

notice when doing the INDOT bid [is that] we didn't qualify as a minority goal. I made calls to find a minority contractor to give us pricing. It seems there are a lot of 'middle-men' out there. One man even said, 'Just get your pricing on materials, and then run it through us.' That's not right. I think there is a fair amount of that going on, which I don't think is the intent." [#13]

- A Subcontinent Asian American owner of an MBE-certified professional services firm reported that he has seen abuse of the good faith efforts process. He stated, "There are so many contracts that get waivers on MBE/WBE participation ... it is pretty alarming sometimes." [#49]
- A Subcontinent Asian American owner of a DBE- and MBE-certified professional services and construction firm stated, "There should be enough of a review and monitoring [to prevent problems]." [#74]
- A Black American owner of an MBE-certified specialty contracting firm pointed out that he gets a lot of bids from companies because he is an MBE. He noted that the work is not even in his area, but they are sending it out to try to meet an MBE goal and contact MBE companies. He stated that his complaint is that he gets the bids one to two days before the bids are due. He said that, as a small company, that does not give him enough time to go and get bid documents to review and prepare a quality estimate. He said, "It's like they are sending them just so they can say they sent them ... Even if I wanted to do the job as a minority, that doesn't give me enough lead time to do it." As an example, he showed a bid that he had received on April 18 that was due on April 20 at 5 pm. [#22]

  The same interviewee commented that if companies are not going to give them enough time to adequately review and estimate a bid, then why even send it out. He said, "Some of these policies and procedures are done just to say we've done it. They are not effective. I think the state needs to require them to send out to minorities at least five days ahead of when it's due." [#22]

One interviewee reported no knowledge of abuse of good faith efforts. A non-Hispanic white male representative of a majority-owned specialty contracting firm stated that his firm performs good faith efforts. He has no knowledge of abuse of good faith efforts. [#54]

MBE/WBE/DBE "fronts" or fraud. Interviewees from a diverse range of experiences and opinions commented on "fronts," or fraud. Some gave first-person accounts of instances they witnessed, whereas others spoke of less-specific instances or those of which they had no first-hand knowledge. [e.g., #5, #7, #8, 9b, #21, #37, #40] For example:

- The non-Hispanic white female owner of a WBE-certified goods and services firm reported that there are quite a few businesses out there claiming to be WBEs that are not. These firms put the business ownership in the wife's name, but the husband runs the business. She indicated that this occurs quite often and that the state knows this but fails to do anything about it. [#1]
- When asked about false reporting, a Black American female owner of an MBE- and WBE-certified professional services firm indicated that she has heard of many

companies that have WBE status, but the husband actually runs the business. She continued, "The firm I know that says they are woman-owned is owned by a white male, but they have a woman running it. She has 51 percent. When we've done our research and our PI work, we know. And, they've got all the paperwork. It all goes along with their story. There's nothing we can do about it." [#65]

- When asked about false reporting, a Subcontinent Asian American male owner of an MBE- and SBE-certified construction firm indicated that he knows of businesses that certify as WBEs, but are husband-run. The business puts the company in the wife's name simply for the certification. [#12]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm said he has heard of abuse of the disadvantaged business certification. He stated, "I know of one company [where] the guy is no longer in business. He had his business set up as a woman-owned business through his wife, but she didn't even have a clue what was going on in the business." He also indicated that he has heard of businesses being "pass-through" organizations. [#57]
- The non-Hispanic white male owner of a construction firm noted that he has run into false minority reporting at a major company. He stated that an engineer at the major company was using his high school son as the owner of a different company. [#23]
- When asked about any false DBE reporting or abuse, a Subcontinent Asian American female owner of an MBE-certified goods and services firm stated that she was aware of contractors that were just trading companies claiming to be MBE or DBE firms. She said, "They don't have their own production. They have one person who applies for government contracts as an MBE. They do the trading but not the actual production." [#36]
- The non-Hispanic white male representative of an Indiana small business development center reported he knew of one instance of false MBE and DBE reporting, and that the state is aware of it. [#47]
- A Subcontinent Asian American male owner of an MBE-certified professional services firm commented that he feels as though there is an abuse of certifications through "fronts." He added that while he cannot prove it, he is seeing it more often than he used to. He went on to say, "This is a great state ... I would like to see this program really succeed, and I would like to see more MBE and WBE success." [#49]
- When asked about false reporting or abuse of the good faith efforts process, a Black American male owner of a professional services firm indicated that he has seen compliance issues. "We've seen false reporting ... but they cover their tracks well." He stated that in one instance, they saw a minority-owned firm staffed with a majority-owned firm's workers. [#67]

A number of businesses reported on "pass-throughs." A number of businesses provided information on "pass-through" firms that had limited involvement on the job:

- The Black American male owner of an MBE-certified specialty services firm mentioned that he is aware of abuses in the MBE program with "pass-throughs," and that the state needs to do more to fight them, as he feels it is a big problem, especially with distributors. He went on to comment that the City of Indianapolis does a good job in fighting these "pass-throughs." He explained that the pass-through distributor does not have the agreements with the various brands and is buying all of their supplies for the project through another distributor and getting credit as an MBE-certified business. [#6]

  The same interviewee then mentioned that a person can tell when someone is a "pass-through" when a company does not have enough employees to do the job for which they are contracted. He reported the need for investigation, starting with the big dollar contracts. [#6]

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female reported of a job in which an individual called his firm and asked them to buy the roof materials for a job, and in effect make $10,000 just for making the call to purchase those materials. His firm did not take that offer because they want to be involved in the work if they are going to be a subcontractor. He said that his firm did not want to be a pass-through to allow the other companies to meet subcontracting goals. [#3a]

- A Hispanic American male owner of a goods and services firm reported that most of the MBE businesses he knows are Black American-owned businesses, and they "just push paper." He said, "We actually go out and do the work. The companies that are getting the contracts are 'paper' companies. The only thing they are doing is hiring subcontractors and facilitating all the paperwork through their office. They are getting this 25 percent extra because they are facilitating the other. You think, 'this is just crazy. They are getting paid just for doing paperwork.' However, they are good at the paperwork, and they have the certification. So, they've got a niche." [#33]

Any adverse effects of programs on businesses not eligible for the program. Some business owners and managers provided insights on the impact of MBE/WBE/DBE project goals on non-certified firms. Examples of such comments include:

- The non-Hispanic white female owner of a WBE-certified goods and services firm indicated that the certification program could cause some companies to not get business in favor of someone who is certified but not qualified. [#1]

- A non-Hispanic white male representative of a majority-owned specialty contracting firm stated that certified firms have others reach out to them more and send them invitations so they can meet their requirements. He said that if a firm is not certified, then firms are not reaching out to them as often. [#54]

- When asked whether there are disadvantages to the businesses who do not have certification, the non-Hispanic white female owner of a WBE-certified professional services firm commented, "Oh yeah. The white male ... I think he's the minority now." [#56]
- When asked about any negative effects of programs on businesses not eligible for the program, a non-Hispanic white male owner of a construction firm commented, "Well, of course, there [are]. United States Veterans [Administration], they will never issue a fuel systems contract without it being a service for disabled veterans' businesses only ... I never qualify because of that. I either have to find another business to partner with, or joint do it with, or I have to subcontract." [#61]
- A Black American female owner of an MBE- and WBE-certified professional services firm stated that there are negative effects for businesses not eligible for the MBE/WBE/DBE programs. She stated, "You shouldn't have to have a designation to do business with me. If I do quality work, you should do business with me because I do quality work." [#65]
- When asked if there are any negative effects on businesses not eligible for the program, a Subcontinent Asian American owner of an MBE-certified professional services firm commented, "Not in this day and age." [#49]

Any MBE/WBE or supplier diversity programs in the local private sector. Some business owners and representatives reported knowledge or experience with MBE/WBE or supplier diversity programs in the local private sector. [e.g., #30]

- A Hispanic American male owner of a non-certified goods and services firm mentioned that he is aware of private companies that have a supplier diversity program. [#33]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm noted that she is aware of the supplier diversity programs at a private company. She also commented that it is tough, as a small business, to get to talk to the right people at large companies. [#36]
- When discussing MBE/WBE or supplier diversity programs in the local private sector, a Hispanic American male owner of a specialty contracting firm stated, "We split up everywhere ... I try to go after groups that are woman-owned, local or smaller ... I try to help them out whether they know it or not." He also noted that he could get better prices from larger firms. [#41]

K. MBE/WBE/DBE Certification

Business owners and managers discussed the process for MBE/WBE/DBE certification and other certifications, including comments related to:

- Knowledge of certification opportunities *(page 163)*;
- Ease or difficulty of becoming certified *(page 165)*;
- Advantages and disadvantages of certification *(page 171)*; and

- Experience regarding the certification process and any recommendations for improvement *(page 175)*.

Knowledge of certification opportunities. Some interviewees discussed their level of understanding about certifications.

Some reported limited awareness of certification or had questions about the process or benefits. For example, some had no knowledge, while others had questions about certification. A few examples from the in-depth interviews include:

- A Subcontinent Asian American male owner of a non-certified professional services firm reported that he was not aware of any state MBE certification opportunities, and that he has not become certified. [#21]
- A Hispanic American male owner of a non-certified professional services firm indicated that he does not have any knowledge of certification opportunities. [#38]
- The non-Hispanic white male representative of an Indiana small business development center reported that he thinks most businesses are aware of the MBE and WBE certification programs. He stated, "I think they're aware of it, but I don't think they know what it is. If someone has questions about that, we refer them to IDOA so we can make that connection as soon as possible." [#47]
- A Subcontinent Asian American female owner of a non-certified professional services firm noted that while she believes she is eligible for a WBE or an MBE certification, she is unsure whether the firm can hold both certifications simultaneously. [#9a]

A number of interviewees reported awareness but had not yet certified or qualified as an MBE, WBE, or DBE; some certified with a few public agencies. [e.g., #8, 9a, #29, #17, #40] The following reported on their reasons for not certifying, or certifying with only a few public agencies:

- When asked about knowledge of certification opportunities, a Hispanic American owner of a non-certified specialty contracting firm reported, "The application [is] still sitting in my file ... [I] just haven't got around to it ... By the time I get through it, I will probably retire." [#41]
- A Hispanic American male owner of a non-certified goods and services firm reported that he is aware of MBE certification and that he would qualify, but he is not a certified. [#33]
- A Subcontinent Asian American female owner of a non-certified professional services firm noted that while she is aware of the WBE certification, she has not pursued it yet. [#9a]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm reported that her company certified as an MBE with the City of Indianapolis but not with the State of Indiana. She stated that they are working on the state requirements for MBE status, and one of the requirements is to be a

citizen of the United States. She noted that they are close to becoming citizens, but are not citizens yet. She indicated that for the City of Indianapolis certification, they did not need to be citizens. [#36]

- A Hispanic American female owner of an MBE- and WBE-certified professional services firm noted that she is aware of the INDOT program. She said that they are not involved or certified right now but are looking into it. She added that she is aware of and participates in the State's MBE/WBE Program. She said she is aware of the programs at the universities, but does not know how consistent those programs are or what the specifics are for them. [#7]
- A Black American male owner of a non-certified professional services firm stated that he knows about certification opportunities in different areas, because he has clients that have it and tell him about it. However, he said, "I don't go after it." [#67]

Some interviewees reported widespread awareness, or that learning about certification was relatively easy. A number of their comments follow:

- As far as knowledge of the certification opportunities, the non-Hispanic white female representative of a trade organization noted, "People know. I think they understand." [#50]
- The Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm stated that she had no problems getting information on certification opportunities. [#51]
- A Black American male co-owner of an MBE-certified specialty contracting firm stated that he found out about the opportunity to become certified when the local home builder association offered to help him with his certification. [#63b]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm remarked that IU was instrumental in encouraging her to get the WBE certification. She added that she would occasionally get calls and invitations for her to find out more. [#73]
- A non-Hispanic white female owner of a WBE-certified professional services firm indicated knowledge of certification opportunities. She stated that she has knowledge through the Women's Business Enterprise Council and did not know if one is better than the other. [#52]
- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners reported that some of her members are very knowledgeable of certification opportunities and knew what they needed to do early on. She also noted that they educated themselves. [#45]
- When asked how she learned about certification opportunities, a non-Hispanic white female owner of a WBE- and DBE-certified construction firm explained that she was able to learn a lot about the program on her own. She did not have a lot of help in getting approved. [#55]

Ease or difficulty of becoming certified. A number of interviewees commented on how easy or difficult it was to become certified.

Many interviewees reported difficulties with the MBE/WBE or DBE certification process. Some interviewees indicated that the certification process was very difficult or problematic. [e.g., 9a, #13, #37, #45, #49, #74] Comments included:

- A non-Hispanic white male representative of a majority-owned professional services firm commented that as he understands it, it has become difficult to obtain DBE certifications. He added that he has worked with WBE and MBE companies, and that their owners have indicated that they have to "jump through a lot of hoops" to certify. [#72]
- The non-Hispanic white female owner of a non-certified professional services firm indicated that the process of certification should be more streamlined. She stated, "Attempting to apply for woman-owned business for a small business through the state has been very difficult." [AI#28]
- When asked about the certification program, a Black American owner of a non-certified specialty services firm reported that it has been a difficult process. He added that even when he has shown the certifying body everything they requested, it is still difficult. [#16]
- The non-Hispanic white female owner of a specialty contracting firm commented that the certification process is very difficult. She stated she is in the WBE certification process for the state but does not know where she is in the process. She said that she started it six or eight months ago. She went on to report that she had applied for state certification a few years ago but gave up. She said, "I gave up because of red tape, paperwork, not knowing what to do next. No one will help you up there at the state office when you call." [#8]

  The same business owner also reported that she has not gotten much help from the City of Indianapolis office officials. She said, "I've emailed [an official] two or three times. He says, 'I will help you.' I've emailed him, nothing. I've called up there, tried to leave messages, nothing. I've gotten some kid that did talk to me, but he asked the shortest questions possible, shortest information. If he gives me something, he says, 'Okay, you good?' Okay, sure thanks.' So, I have not gotten a lot of help out of that office." [#8]

  The same interviewee went on to report, "I didn't understand that there's more than one place you can even apply. I thought you got your WBE and it was a federal or state certification. Ralph Adams said, 'No, you can get the State of Indiana, City of Indianapolis, and [IN]DOT certification, and there may be more.' I said, 'Really? You've got to do this again?'" [#8]
- The non-Hispanic white female owner of a non-certified construction firm noted that she is in the process of renewing or reapplying for the WBE certification but is having some problems. She stated that she had talked to someone at the state office who said, "No problem, just fill out these forms and send in your payment." She did that and sent them in and then, received notice back that it would not be that

simple, that she had to start all over with a new application. Now, all the forms are on her desk to review, complete, and send in. [#24]

The same business owner indicated that in getting certified, the problem is not in filling out all the forms, it is in running down all the information. She stated that in the reapplication process, she had to find all the needed information again. She said, "You need to have three years of financials, birth certificate, resume, driver's license, and updated corporate minutes ... It took me a good 40 hours to pull it all together." [#24]

- A Hispanic American male owner of a non-certified goods and services firm pointed out that he has not pursued an MBE certification because it is a difficult process. He commented, "I had to provide information on my birth certificate, my dad's birth certificate, my mom's birth certificate. We didn't have all the information they needed to get certified." He noted, however, that he understands why it needs to be such an in-depth process. [#33]
- A Black American male owner of an MBE- and DBE-certified specialty contracting firm reported difficulty with the certification process. After a friend helped him get the process started, he commented that he was "given the runaround" throughout the remainder of the process. [#48]
- A Black American female owner of an MBE- and WBE-certified professional services firm stated that, despite a relatively easy certification, recertification was "a nightmare." She commented, "Then when it came to be recertified ... there was something about my financials ... My accountant had to get involved, and then [the IDOA representative] was unresponsive." She added, "I had to go over her head and go to leadership at IDOA ... What should have been a very quick process ended up taking over eight weeks." She said that she missed the deadline for the recertification. [#2]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm indicated that certification was "a pain." He said, "They make it way harder than it should be. It should just be, 'Here's my article of business from the federal government. Here's my DD214 saying I'm a veteran. That should be all it takes. I don't see why I have to produce three years of tax returns, payroll reports for employees, and articles of incorporation for the federal registration. The City of Indianapolis was easy at the start, and then they said you have to be on the federal registry. But to get on the federal registry is a six-month process ... I honestly think they don't want people participating in these programs, so they make it tough." [#32]

  The same veteran business owner noted that he thought it would be easier if the City of Indianapolis and the State of Indiana had their own certification process and requirements and did not mandate that you have to be federally certified first. [#32]

A number of interviewees reported extended time between applying for and receiving certification or multiple failed attempts to certify. Examples follow:

- The non-Hispanic white female owner of a WBE-certified professional services firm stated that it was difficult to become certified. She reported that when she first started, she was trying to get her foot in the door with a certain business. The business suggested that she go for her WBE certification and gave her the website information. She began the certification process in December of 2003, and she got the certification granted in May of 2006. She commented, "I heard there was somebody [in IDOA] that wasn't doing her job, and that [that] person's no longer there." [#56]
- A Black American female owner of an MBE-certified professional services firm reported difficulty with the certification process. After two attempts to certify, the state still denied her certification. [#29]
- The non-Hispanic white female representative of a trade organization explained that she is on her third time of trying to be certified. She noted that the first time she tried, she was not ready. When she tried a second time, the process was never completed. She had turned in all her paperwork and confirmed it was received, but no one ever got back to her or acknowledged her requests for information. She stated, "I kept sending emails, and no one would respond. You feel not respected." She is currently trying a third time. [#50]

  The same representative noted that her members are experiencing similar frustrations with the certification process. She said, "I know that [for] at least one other member, this is her third or fourth attempt. She has gotten an attorney involved." She then reported that one of her members lost a contract due to not being certified. The City of South Bend said that businesses did not have to be certified, they just needed to prove that there were 51 percent owners for them to count as a woman-owned business. One of her organization's members bid on a project as a subcontractor based on this information. She added that the state told South Bend that the companies had to be certified. At that point, the prime contractor contacted the subcontractor and said that he could not use her. [#50]

  On the topic of the certification process, the same interviewee commented, "I understand being strict, but I know there are good companies that aren't being certified. I don't know why. There are only 15 [certified companies] in all of St. Joseph County." [#50]
- The Hispanic American male owner of a non-certified specialty contracting firm stated that he is now trying to become certified. He continued, "We had applied back in 2006, and I was still very shy and new. I wasn't really good with talking to people and opening up. So, we were denied. It pretty well said those things, that I wasn't showing leadership and capability. But, I've changed a lot since then." [#62a]

  The same business owner added that he is reapplying for certification now. He noted that some of the questions are confusing, and that he has had to rewrite sections. He commented, "For instance ... we submitted our packet last week, [and]

the person who looks at them looked at it. The parts that were correct, they kept. There's a few that we have to get more details about. Some of it's a little confusing, I would say." [#62a]

Some interviewees indicated that a major issue with the certification process is that it is labor intensive and time-consuming; for some, the paperwork was also a barrier. For example, a number reported lengthy information gathering and paperwork:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm commented that getting certified was labor intensive. [#73]
- A Hispanic American female owner of an MBE- and WBE-certified professional services firm mentioned that certification is very time-consuming. She stated that to get certified, it seemed like they had to jump through hoops. [#7]
- She indicated that going through the certification process can be a barrier for a small business. She said that a small business may not be used to having or keeping all the business information that is required. She said, "To get certified, you needed to start out your business with all your ducks in a row. And, many small businesses may not have done that." [#7]
- The non-Hispanic white representative of an Indiana small business development center reported, "It's easy, but time consuming. There are things you have to do in it like hard copies as opposed to online. It's just very time-consuming and expensive when you mail it." [#47]
- A Hispanic American female owner of an MBE- and WBE-certified professional services firm reported that her certification is up for renewal and that renewals can be "time-consuming." This is now their fourth time and they know now what information the state needs, so they are ready for the renewal process. [#7]
- In regards to the ease or difficulty of becoming certified, a Hispanic American male owner of a non-certified specialty contracting firm stated, "The one time I actually went through the opening packet, it was intimidating. I stayed away from it." He added that when he opened the packet and looked at everything that was in it, he found it so intimidating that he "literally put it aside." He went on to say that he did not get back to it, and that this was about 18 months ago. [#41]
- A Subcontinent Asian American owner of a DBE- and MBE-certified professional services and construction firm reported, "The certifications process [is] cumbersome ... They could be streamlined, simplified." [#74]
- A Native American male owner of a non-certified construction firm reported that he knows about certification opportunities, but that there is too much paperwork involved and time required. He commented, "Time is money." He went on to add that he feels that it is impossible to become certified. [#71a]
- When asked about the ease or difficultly in becoming certified, a Black American owner of a non-certified professional services firm noted that it was "a pain in the [behind] ... to sit down and do all the paperwork," and he wondered if it was worth it. [#67]

- The non-Hispanic white female owner of a WBE-certified professional services firm indicated that the certification process was difficult because of all the paperwork. She said, "I didn't start the business but bought it. So, I had to go through a lot to prove that I had used my own money to buy the firm. I had no relationship to any of the previous owners. I was not gifted or given anything but to prove that was pretty challenging." [#30]

  The same interviewee also commented that she knows why the state was making it difficult to become WBE certified and she appreciates it. She said, "I, in no way, fault them. At times, I was wondering if I would really get certified because it's pretty challenging to prove it. I was going through records several years old as I bought the shares over time." [#30]

  The same owner of a professional services firm then mentioned that part of the delay and difficulty in certifying was her fault, as she did not keep records. She said, "I thought if I had my stock certificate that that would be sufficient. But it wasn't. You had to really prove how you had received and paid for the shares over time. And, that is where I struggled the most, digging up the appropriate records. But, I was eventually successful." [#30]

- A Hispanic American male owner of a non-certified goods and services firm indicated that the MBE certification process with the state can be difficult. He stated that they are a small business without the time to find the information and fill out the forms. He said, "It's not a one page form. The last time I looked, it was a 35 page form ... We don't have the profit margin to go hire a lawyer or hire an assistant to do the forms." [#33]

- A Hispanic American female owner of a non-certified professional services firm stated that applying for the MBE certification involved a "horrendous application," and that she did not have the time to fill out all of the paperwork. Because of this, she never applied for certification. [#64]

Some interviewees reported a level of unfairness embedded in the certification process. For example, some reported the challenges they faced:

- A non-Hispanic white male representative of a DBE-, MBE-, SBE-, and WBE-certified construction firm owned by a Hispanic American female company stated that it was difficult to get certified in the beginning "because [the owner] wasn't part of the political machine." He went on to say that they have evidence that the owner's application sat in the state files for six months and kept getting moved down the stack before they inquired about delay. He went on to report that "no one wanted to touch our files because we weren't a democrat. Then someone not a democrat came in and we were certified within 30 days." [#3a]

- The non-Hispanic white female owner of a WBE-certified goods and services firm reported, "The application process has always been ridiculous, a monster. It does not get to the truth. I could sit here and make a list of all the companies that are owned by the husband, and the wife has her name on it to get the certificate." [#1]

- A Black American male owner of an MBE-certified specialty contracting firm mentioned that a difficulty he had with getting certified was that the state was looking for specific codes for his business. He stated he thought he could get certified for certain codes, such as plumbing or electrical, if he did enough business in those areas and used subcontractors. However, he noted that he later found out that to get certified in a code you had to have the plumbers or electricians as your direct employees, not as subcontractors that you use. [#22]

  The same interviewee indicated that he was confused because he found out the need to have plumbers or electricians on staff to certify for those codes, but a he knows of a large general contractor does not have any plumbers or electricians and is certified for those codes. He said, "How is that possible? They can be certified for those codes, and I can't. It's almost like as a minority and a small company; you come under greater scrutiny than the big companies. When I ask the Indiana Department of Administration about it, they don't give me a response. They don't respond to your questions. At least they haven't responded to mine." [#22]

- The non-Hispanic white female owner of a WBE-certified goods and services firm reported "Three years ago when we went to reapply, they asked for our income tax returns. My son is now a minor owner, so I'm still a majority owner. He is married; I am not. They wanted his and his wife's tax returns, and mine... I've read the legislation, [and] that is not required. But somewhere along the line, they put that little line in there and said you have to do that. That is ridiculous, I would never do it." She added that she was able to get past it by providing other documentation. [#1]

  The same business owner added that this year, they asked for the tax records again, and would not accept any other documentation. She went to the Secretary of State and talked to the head of the Women's Division. Together they met with an attorney, and she was renewed.[#1]

- The Black American owner of an MBE-certified specialty services firm noted that to get certified as an MBE in a certain state, you have to live there. He can get certified in Indiana, but not in Ohio. You cannot just have an office there. He said the same is true for Indiana. If you do not live in Indiana, your company can not get certified as an MBE in Indiana. [#6]

Some interviewees said that the MBE/WBE or DBE certification process was reasonable, or they reported that they received assistance with the process. [e.g., #19, #40, #51, #52, #55, #65] For example:

- A Subcontinent Asian American male owner of an MBE- and SBE-certified construction firm indicated that there are no issues with becoming certified. He reported that he simply filled out the paperwork. He went on to comment that he did not keep his certification u-to-date because it "does not do any good." [#12]

- When asked about how hard or easy it was to get certified with the City of Indianapolis, a Subcontinent Asian American female owner of an MBE-certified goods and services firm indicated that it was an easy process. She stated, "They

were pretty helpful. They explained to us what was required. We gave them all the documents. They came and inspected us and gave us the certification. It was fine ... We applied in November and got it within one or two months. They were very helpful." [#36]

- The non-Hispanic white female owner of a WBE-certified professional services firm reported that the recertification process has worked well. She stated, "The first time, it was very lengthy. After that, [it was] easy. The biggest problem I have is that my certification is due in April, and you need to send in your last year's tax information. Sometimes, you do not have your taxes done in time to get it. That is difficult. I wish they would change [the date]." [#56]
- A Black American female owner of an MBE- and WBE-certified professional services firm indicated that the process to become certified was easy. She indicated that the process is more streamlined now, so the renewal process has worked well. [#65]
- The Black American owner of an MBE-certified specialty services firm noted that it is "pretty easy" to get certified, and he feels they have streamlined it and made it even easier with the internet and their websites. [#6]
- A Black American owner of an MBE-certified goods and services business reported that, despite some challenges with certification, he had help along the way. He said, "I guess it was somewhat hard because of all the stuff I had to hustle up. But I will say this, all the staff were patient and helpful. They answered all my questions. They pointed me in the right direction ... I talked to this one particular lady all the time, and she was really helpful." [#27]
- Regarding the advantages of certification, the non-Hispanic white female owner of a WBE-certified construction firm stated, "[State of Indiana representative], you helped me get certified, and everything that this Department does, because they really opened a lot of doors for me that I would have never had opened for me before. But all I'm saying, I just appreciate what you're doing." [PF#10]

Advantages and disadvantages of certification. Interviews included broad discussion of whether and how DBE certification helped subcontractors obtain work from prime contractors.

Many of the owners and managers of MBE-/WBE- and DBE-certified firms interviewed indicated that certification helped their business get an initial opportunity to work. [e.g., #19, #36, #51, 62a, #71a, 73] Examples of interviewee comments include:

- A non-Hispanic white female owner of a WBE-certified professional services firm stated, "It's a gate opener." [#52]
- A Black American male owner of an MBE-certified goods and services business indicated that he saw advantages to certification. He reported, "If [I] wouldn't have had this certification ... I don't think I would've got my foot in the door without the certification." [#27]

- A Subcontinent Asian American owner of an MBE-certified professional services firm commented that being certified puts focus a firm, and that it helps eligible firms secure both prime contract and subcontracting work. [#49]
- A non-Hispanic white male representative of a majority-owned specialty contracting firm commented that the advantages of certification include adding a reason for larger firms to hire the certified firm. [#54]
- When asked about the advantages of certification, a Black American female owner of an MBE- and WBE-certified professional services firm stated, "In working with larger businesses out-of-state that have a real true diversity supplier program, it has been an advantage to open the door." [#65]
- A non-Hispanic white female owner of a WBE- and DBE-certified construction firm reported noticeable business opportunities. She commented, "It gives me work all of the time." [#55]

Some reported advantages specific to working with public agencies. For example, some said certification was a platform for working on public sector jobs.

- A Black American owner of a specialty contracting firm stated that there is an advantage to having certification. She said, "It is good to have it on your side to get jobs with city and state agencies. It could be well worth it ... For someone doing it for the first time, it is definitely well worth it." [#40]
- The Black American owner of an MBE-certified specialty services firm pointed out that there may be some advantages to being MBE-certified, particularly in government work. It might help you get a "foot in the door" where you might not otherwise. So, he said, it can be helpful as it gives you access to business and the "good ol' boy" network. He noted that because you are MBE-certified, [members of the "good ol' boy" network] now have an incentive to use you to meet the goal requirements. [#6]
- A Black American female owner of an MBE-certified professional services firm reported advantages to being certified. She said, "I saw getting more business. I really thought it would be an advantage for us, and we would get more state accounts. Because with those accounts, you don't have to worry about getting ripped off. They are going to pay you what they say they will and when they say they will for what you are to do. You don't have to worry about all the other stuff. I would rather work with the state and government than anybody." [#29]
- A non-Hispanic white male veteran owner of a VBE-certified professional services firm reported that he sees advantages of certification in generating new business. He stated that the projects he got with the City of Indianapolis kept them from going out of business during the start-up years. He said, "It is nice. It does provide an advantage. It provided some opportunities I don't think we would have had otherwise." [#32]
- The non-Hispanic white male veteran owner of a SDVOSB-certified construction firm reported, "[That is] the way I get a lot of state work ... Since I'm a veteran-

owned business, and they have the three percent deal with the veterans, they use me for subcontracting to meet their goals, which definitely helps out for veterans. Goal-setting for the state is one of the better things they've done to help out the veterans. The only problem with being certified is that there are not many veterans certified in the state. It's a real pain in the [behind] to go through the federal certification." [#57]

Some interviews indicated that there are limited advantages, or even disadvantages, to being MBE-/WBE- or DBE-certified, or to having other certifications. [e.g., #5, #53] Examples of interviewee comments include:

- When asked about the advantages of certification, a Subcontinent Asian American owner of an MBE- and SBE-certified construction firm reported, "I have gotten some calls ... Have I gotten hired because of that? They're not going to throw out a low number to hire me. The low number always wins." She went on to say that she does not think the certification helps her get more work. [#12]
- Regarding the advantages of certification, the Hispanic American owner of an MBE-certified construction firm stated, "To us, the only thing it kind of does for us is some of our larger clients that have a diversity program. It helps them to ... check the box off. I don't know it has actually gotten us anything. [It's] just an extra feather in our cap with that client." [#13]
- The non-Hispanic white female owner of a WBE-certified goods and services firm said, "The only way the certification is helpful to us ... is because of the corporate partnerships where the state puts pressure on the corporations to place a certain number of dollars with WBEs ... I believe we have a whole lot of really happy corporate customers that they get to check that box." [#1]

  The same interviewee added, "It actually can be a disadvantage to us. So here I have a successful 30-year operation, I hire 25 people and two of them are men, plus my son, so three are men ... so they are all women. If I drop dead tomorrow, are we going to lose all these contracts?" [#1]
- The representative of a WBE-certified professional services firm owned by a non-Hispanic white female stated that she got certified because, "I thought I would get jobs. I thought I would get referrals from the state. The only things I got ... weren't relevant." [#26]
- The non-Hispanic white female owner of a WBE-certified professional services firm reported no strong advantage to being WBE-certified in the State of Indiana. She said, "I was hoping it would open the doors to other potential clients, other state institutions, other higher education institutions. At least to let us get in there and get a chance ... and that hasn't happened." [#30]
- A Hispanic American owner of a non-certified goods and services firm mentioned that, given all the time involved the certification process, there is not much reward. [#33]

- The non-Hispanic white female owner of a WBE-certified professional services firm mentioned that sometimes she will be asked to bid on a project because she is WBE-certified. She said that often, her firm is not really being considered for the job, but rather she is being asked to bid in order to show that the prime contractor reached out to a WBE-certified business. She said that when this happens, being certified can be a disadvantage, because putting together a bid costs her firm time and money. [#30]
- When asked about any disadvantages of certification, a Black American owner of a professional services firm stated that if the customer is not committed to diversity, then certification may not help. [#67]
- The non-Hispanic white female director of the Indiana chapter of a national organization for women business owners indicated that certification can be expensive for her members. [#45]
- A non-Hispanic white female owner of a WBE- and DBE-certified construction firm indicated that there are disadvantages to becoming certified as a WBE. When bidding on a job, she is unable to use her own company to help reach percentage goals. She sometimes opts to be a subcontractor because meeting the percentages can be difficult in her area. [#55]

Some indicated that they do not rely on certification to secure work. Examples include:

- A Black American owner of an MBE-certified specialty contracting firm mentioned that he sees advantages to being certified, but that he does not depend on the certification. He said, "It'd be nice to have it, to broaden the opportunities out there, but we are successful today not because of it ... In the construction side, there are great opportunities for the state-funded jobs and for private sector jobs that want to know if you are an MBE, but it still comes down to price." [#22]
- When asked about MBE/WBE and DBE certification, the non-Hispanic white female owner of a non-certified professional services firm commented that she has not looked into the program. She added that she does not have the time to research it and is not sure it would benefit her. [#68]

  The same business owner said she feels like it would be a lot of red tape. She added, "I could go through all this, and it doesn't help me at all." [#68]

Some businesses expressed that there is a negative stigma associated with being an MBE/WBE or DBE, minority- or woman-owned firm, or small business. For example:

- A Hispanic American female owner of an MBE- and WBE-certified professional services firm reported that a disadvantage of certification could be that you get pigeonholed as being too small and only doing subcontractor work. When asked about minority stereotypes, she reported that they happen. She said, "Because you are a minority, you are seen as being subpar. I think that happens." [#7]

- The Black American owner of a non-certified professional services firm noted that one disadvantage of getting certified is "being pigeonholed, or identified as someone getting an unfair advantage." [#37]
- A Subcontinent Asian American male owner of an MBE-certified professional services firm commented that a potential disadvantage for certified firms is that "sometimes you get branded." He added, "I don't advertise MBE-certified on anything. We want to get the work because we are capable. If [companies] are getting on the MBE checklist, that is good, but [I] don't want the work just for that."[#49]
- A Black American owner of a specialty contracting firm explained that a disadvantage of certification might be the paperwork involved and that "some of the larger companies look at you 'funny.'" He added that he thinks others look at an MBE-certified company and think, "If you weren't MBE, you wouldn't be getting this contract." [#40]

  The same business owner also noted that once an MBE overcomes the stereotype and proves itself, "then you become a threat, because you proved yourself and you're an MBE." [#40]

Experience regarding the certification process and any recommendations for improvement. Interviewees made recommendations for a number of improvements to the certification process.

Some recommended a need for simplification. For example:

- A Hispanic American male owner of a specialty contracting firm stated, "[The certification paperwork] seem[ed] like it was written in Latin. I wasn't familiar with quite a bit of the jargon contained therein ... but now I know what it was." He added that while he learned from his experience, the process should be simplified. [#41]
- The Hispanic American owner of a specialty contracting firm reported that the certification application should be simplified to include clear and specific instructions on what is wanted and in what format. [#62a]
- The non-Hispanic white representative of an Indiana small business development center stated, "If there is a way to do it digitally, that would increase the people willing to provide the information." [#47]
- When asked about ways to improve the City of Indianapolis' certification process, a Subcontinent Asian American female owner of an MBE-certified goods and services firm pointed out that they can make it easier and less complicated for the common person to get a contract and get in front of the right people. She said, "How do you get in front of the people or organization that needs signs? That's what we need." [#36]

Some reported communication and transparency as key, followed by other recommendations. Examples of interviewee comments include:

- The Hispanic American female owner of an MBE- and WBE-certified specialty contracting firm recommended improved security and communications, increased transparency, and bid-packet tracing capabilities. [#51]
- A Black American owner of an MBE-certified specialty contracting firm stated that his top three recommendations would be, "Communication [first]. Then, I would say there needs to be a general contractor code for commercial. Finally, the timelines—it takes too long to get certified and to get the codes added." [#22]

A number of interviewees had comments regarding enforcement and implementation of certification programs. Examples of interviewee comments include:

- A Black American female owner of an MBE- and WBE-certified professional services firm stated that it is prudent for the state to screen certifying businesses. She indicated that certification should not be immediate. Instead, she suggested that in-depth discussions would ensure that certifying firms are not fronts. [#65]
- The Black American male owner of a professional services firm recommended that certification programs include a systematic growth plan for upcoming businesses. He reported a need for an initial pre-certification step that helps businesses generate revenue while working toward certification. [#37]
- A Black American partner in an MBE-certified specialty contracting firm stated that he would like to see MBE certification cover multiple job classifications for a single firm. He went on to report that currently, certification only covers the single line of work named by the firm during the initial certification, and that his firm now completes additional, different types of work. [#53]
- A Black American female owner of an MBE-certified professional services firm pointed out that she would like the state to provide more upfront information about franchises. She commented that this way, a firm does not go through all the work only to find out that it does not qualify because it is a franchise, or does not hold worker's compensation insurance. She noted that there should be a special franchise section with the eligibility requirements spelled out. [#29]

L. Any Other Insights and Recommendations Concerning Indiana Contracting or MBE/WBE and DBE Programs

Interviewees provided other suggestions for Indiana state agencies and public colleges to improve its small business or MBE/WBE and DBE programs, or any other insights or recommendations.

A number of interviewees recommended a need for transparency in the bidding processes, and unified bid postings. For example, some wanted to see bid ceilings and other critical information:

- A Black American female owner of an MBE- and WBE-certified professional services firm indicated that she would like to see more transparency in bidding stating, "I would like to see the numbers. I think that the public sector has a responsibility to be more transparent and share numbers ... The Commission has done a good job with helping with that transparency." [#2]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated that agencies should let everyone know what the playing field is, particularly when public money is involved, and provide documentation with the statistics regarding the award. He explained that he has been upset about not knowing the details of an award after losing a bid. He also said that after a small company spends hours putting a quote together, it is upsetting not to receive follow-up on why the firm lost. He also explained that it is not worth filing a complaint. He added that, in the field, people just deal with and accept the frustration. [#15]
- The representative of an MBE- and WBE-certified professional services firm reported, "Universities need to be more transparent [on] bid [processes]. I think there needs to be clarity on what are the bid ceilings. Let's be honest. What are the levels that people have to bid and under what levels do they not have to bid? And how do we get access to those under the bid? This can apply for both universities and the state." [#7]
- The non-Hispanic white male representative of a majority-owned construction firm reported that he is concerned about consistency in standards concerning prequalification, qualification, and bid evaluation. He commented, "We need to focus on keeping it transparent and understandable. So, how you qualify them is huge." [#66]
- A non-Hispanic white female owner of a WBE- and DBE-certified contracting firm stated that she would recommend all agencies use the same standards for submitting bids and "stick to fair bidding practices across the board." [#55]

Some interviewees suggested removing the prime contractor as the intermediary for contract awards. A number reported this as a way to save cost:

- A non-Hispanic white male veteran owner of a construction firm stated that the general contractor marks up his estimate without doing any work. He stated that the state could save some money by contacting the small company directly or allowing them to bid on it. He stated, 'The easier you make it, the better it's going to flow." [#10]
- When asked for any final comments or recommendations, a non-Hispanic white male owner of a construction firm mentioned that he has a major complaint. He noted that since the state has repealed the common construction wage, when the

architects and engineers bid the projects through general contractors, it costs the state or the private owners more money. He said, "That is because the general contractor is marking up every price that he gets. Any time there is a change order, he is marking it up. Everything goes down the line. Everybody, as it goes through ... hands, marks it up ... that costs more money. It's causing us problems as a contractor in getting paid. There is another line of red tape for our money to go through if they are to pay us on time, which they don't. It's problematic to me that the system allows things to be under one general contractor. I don't agree with it."[#18]

The same interviewee reported that a solution to the problem of everything going through a general contractor would be to have all contracts be individual contracts. He stated that those individual contracts could cover mechanical, sheet metal, plumbing, electrical, carpentry, and concrete services. He indicated that all of those contracts would be between the subcontractor and the owner or agency to minimize the "buddy system." He noted that this way, the owner would pay each subcontractor upon completion, not at the very end as with a general contractor. He pointed out that that approach should save hundreds of thousands of dollars over time by not having everything marked up as it goes up the line. [#18]

Some recommended a need for an improved pipeline for hiring talented workers. For example, some spoke about how the colleges and universities could assist:

- A Black American local chairperson of a trade organization reported, "Maybe scholarships for students, exceptional students, [who] want to go into [a related discipline]." [#39]
- When asked for any other suggestions about how state agencies can improve the MBE/WBE and DBE or small business programs, the Hispanic American chair of an Indiana minority-focused business council stated, "The more inclusive you are the better. Make the process as clear as possible and as simple as possible to avoid misunderstanding. Teach people how to be prepared. Education will change a lot of things." [#46]
- A Black American owner of a professional services firm reported a need for "training ... constant training [and] restructure[d] educational programs." He gave HUD as a model. He said, "Identify how to use HUD residents in what you're going to do. Prepare that person to go back to work." He also thought that for some programs, "it forces your contractors to participate in your environment." He believes that this can add more money into training programs to address disparities. He went on to add that he thought there should be more restructuring of the training programs to help people. [#67]
- The non-Hispanic white female owner of a professional services firm commented that "some sort of student loan repayment program" would help those wanting to start a small business. [#68]
- A non-Hispanic white male owner of a goods and services firm reiterated his difficulty in finding good, qualified employees who are willing to work. He stated

that he would like to get something going with the local schools. He said, "I've even considered going over to Ivy Tech to meet with counselors or the placement advisor and tell them 'I've got two items to stress—how to get good kids from your school, and how to train the people I've got. Can you help me?' If I get a similar runaround like I've gotten in the past, I'll just go somewhere else." [#28]

For some, there is a need for improved dissemination of bidding and other information and networking assistance. [e.g., #65, #50, #51] For example:

- A Hispanic American owner of a professional services firm suggested that the state create a portal with details to make it easier for a small business to participate. [#38]
- The non-Hispanic white female owner of a professional services firm stated that a website job board specifically targeted to independent contractors might help her and other small companies get jobs. [#68]
- A non-Hispanic white male owner of a goods and services firm said that she would like a statewide website where companies could register to be a vendor and receive timely alerts when new businesses come to town. [#31]
- A non-Hispanic white female representative of a majority-owned construction firm commented that state agencies and universities should make it easier for firms to find out about bidding opportunities. She noted that all of the various website links should be on a single webpage. She added, "Make it simple for people to be able to do business with them ... I always thought simplifying it as much as possible [was] the easiest way of doing things. " [#34]
- The non-Hispanic white male owner of a construction firm stated, "It's so hard to navigate ... For me to find bidding opportunities on the State of Indiana website, I could spend all day and not find one that I wanted." He pointed out that it would be good for the state to have all the bidding opportunities on one large website, not to have individual ones for each of the universities and other state agencies. [#23]
- A Subcontinent Asian American female owner of an MBE-certified goods and services firm commented that she would like there to be a way to meet people who are looking for her type of business. She also added that she is looking for honest people who really want to help minorities. [#36]

Some provided final comments on the certification processes and race- and gender-based programs. Examples include:

- When asked for any other comments or recommendations concerning Indiana contracting, the non-Hispanic white male representative of a majority-owned specialty contracting firm responded, "In the State of Indiana, I think the public agencies are pretty good about being straight up about what they want and who they want and what they need. I don't see any real degradation of the core businesses in Indiana, whether they're minority or not, or whether they are

disadvantaged or not. I think the state is pretty good. I think they have a pretty effective system. I wouldn't change a lot." [#17]

The same representative added, "If the State of Indiana keeps doing things about the way they are doing, I think it's fair. It's relatively fair. They tend to spread the work around a little bit. They don't give all the work to the same firms. Purdue does that a little. Each one of the agencies, these entities has their favorites. I guess I don't knock that because we're a favorite of a few of them." [#17]

- When asked for any other insights or recommendations about Indiana contracting or the MBE/WBE and DBE programs, a Hispanic American male owner of a specialty contracting firm recommended that the process should be easier for minorities to be involved. Having limited experience, he felt ill-prepared to ask questions and get answers. He reported that he spent time on the phone on hold, and was not able to get answers to his certification questions. He added, "It didn't make sense to me at that time." [#41]
- A non-Hispanic white female owner of a WBE-certified construction firm expressed a need for feedback. She commented, "In short, the biggest complaint I have is, as [a] WBE ... it's important for me starting out to get good feedback from the contractors ... I might need improvement." [PF#10]

Figure F-1.
Disparity analysis results tables in Appendix F

Figure F-	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22
Time period																					
July 1, 2009 - June 30, 2013	X	X	X	X			X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
July 1, 2009 - June 30, 2011					X																
July 1, 2011 - June 30, 2013						X															
Contract area																					
All contracting	X				X	X	X	X	X	X	X	X	X	X	X	X	X	X			
Construction		X																	X		
Professional services			X																	X	
Goods and support services				X																	X
Contract role																					
Prime contracts and subcontracts	X	X	X	X	X	X					X	X	X	X	X	X	X	X	X	X	X
Prime contracts							X		X	X											
Subcontracts								X													
Contract size																					
All	X	X	X	X	X	X	X	X			X	X	X	X	X	X	X	X	X	X	X
Small prime contracts*									X												
Large prime contracts**										X											
Region																					
All	X	X	X	X	X	X	X	X	X	X				X	X	X	X	X	X	X	X
North											X										
Central												X									
South													X								
Goals																					
All projects	X	X	X	X	X	X	X	X	X	X	X	X	X			X	X	X	X	X	X
Projects with M/WBE or DBE goals														X							
Projects without goals															X						
Funding sources																					
All sources	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X						
Federal																X		X	X	X	X
State																	X				
Components of DBE goal																					
Analysis of potential DBEs																		X	X	X	X

* $2M and under for construction, $500K and under for professional services, $75K and under for goods and support services

** Greater than $2M for construction, greater than $500K for professional services, greater than $75K for goods and support services

Figure F-2.
Time period: July 1, 2009 - June 30, 2013
Contract area: Construction; professional services; and goods and support services
Contract role: Prime Contracts and Subcontracts
Region: Statewide
Funding source: All sources
Goals: Projects with and without goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	21,186	$6,433,498	$6,433,498				
(2) Minority- and woman-owned	6,569	$747,035	$747,035	11.6	11.5	0.1	100.7
(3) White woman-owned	4,779	$475,636	$475,636	7.4	8.2	-0.8	90.2
(4) Minority-owned	1,790	$271,399	$271,399	4.2	3.3	0.9	126.3
(5) Black American-owned	490	$92,529	$92,734	1.4	1.7	-0.2	87.0
(6) Asian Pacific American-owned	656	$44,570	$44,669	0.7	0.2	0.4	200+
(7) Subcontinent Asian American-owned	306	$24,576	$24,630	0.4	0.6	-0.2	66.4
(8) Hispanic American-owned	212	$22,736	$22,787	0.4	0.7	-0.3	53.5
(9) Native American-owned	114	$86,387	$86,579	1.3	0.2	1.1	200+
(10) Unknown minority-owned	12	$601					
(11) DBE-certified	4,244	$410,658	$410,658	6.4			
(12) White woman-owned DBE	3,399	$294,720	$294,720	4.6			
(13) Minority-owned DBE	845	$115,937	$115,937	1.8			
(14) Black American-owned DBE	361	$69,160	$69,165	1.1			
(15) Asian Pacific American-owned DBE	158	$20,662	$20,663	0.3			
(16) Subcontinent Asian American-owned DBE	154	$6,850	$6,851	0.1			
(17) Hispanic American-owned DBE	147	$7,179	$7,179	0.1			
(18) Native American-owned DBE	23	$12,078	$12,079	0.2			
(19) Unknown minority-owned DBE	2	$9					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-3.
Time period: July 1, 2009 - June 30, 2013
Contract area: Construction
Contract role: Prime Contracts and Subcontracts
Region: Statewide
Funding source: All sources
Goals: Projects with and without goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	17,079	$5,543,480	$5,543,480				
(2) Minority- and woman-owned	5,460	$638,941	$638,941	11.5	11.0	0.5	104.6
(3) White woman-owned	4,275	$433,550	$433,550	7.8	8.6	-0.8	91.1
(4) Minority-owned	1,185	$205,391	$205,391	3.7	2.4	1.3	152.1
(5) Black American-owned	354	$76,307	$76,389	1.4	1.3	0.1	104.0
(6) Asian Pacific American-owned	506	$32,864	$32,900	0.6	0.1	0.5	200+
(7) Subcontinent Asian American-owned	31	$1,401	$1,402	0.0	0.1	-0.1	21.1
(8) Hispanic American-owned	182	$8,536	$8,545	0.2	0.7	-0.5	22.4
(9) Native American-owned	105	$86,063	$86,156	1.6	0.2	1.3	200+
(10) Unknown minority-owned	7	$221					
(11) DBE-certified	3,620	$367,343	$367,343	6.6			
(12) White woman-owned DBE	3,137	$280,907	$280,907	5.1			
(13) Minority-owned DBE	483	$86,436	$86,436	1.6			
(14) Black American-owned DBE	251	$56,922	$56,928	1.0			
(15) Asian Pacific American-owned DBE	57	$13,554	$13,556	0.2			
(16) Subcontinent Asian American-owned DBE	25	$152	$152	0.0			
(17) Hispanic American-owned DBE	126	$3,734	$3,735	0.1			
(18) Native American-owned DBE	22	$12,065	$12,066	0.2			
(19) Unknown minority-owned DBE	2	$9					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-4.
Time period: July 1, 2009 - June 30, 2013
Contract area: Professional services
Contract role: Prime Contracts and Subcontracts
Region: Statewide
Funding source: All sources
Goals: Projects with and without goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	3,352	$699,815	$699,815				
(2) Minority- and woman-owned	963	$86,260	$86,260	12.3	12.9	-0.6	95.3
(3) White woman-owned	382	$30,719	$30,719	4.4	4.3	0.1	101.2
(4) Minority-owned	581	$55,541	$55,541	7.9	8.6	-0.7	92.3
(5) Black American-owned	118	$6,151	$6,187	0.9	2.6	-1.7	34.6
(6) Asian Pacific American-owned	149	$11,686	$11,754	1.7	1.7	0.0	100.2
(7) Subcontinent Asian American-owned	275	$23,175	$23,310	3.3	4.3	-1.0	77.2
(8) Hispanic American-owned	27	$13,883	$13,964	2.0	0.0	1.9	200+
(9) Native American-owned	9	$324	$326	0.0	0.0	0.0	200+
(10) Unknown minority-owned	3	$323					
(11) DBE-certified	585	$34,084	$34,084	4.9			
(12) White woman-owned DBE	233	$12,435	$12,435	1.8			
(13) Minority-owned DBE	352	$21,649	$21,649	3.1			
(14) Black American-owned DBE	100	$4,385	$4,385	0.6			
(15) Asian Pacific American-owned DBE	101	$7,107	$7,107	1.0			
(16) Subcontinent Asian American-owned DBE	129	$6,699	$6,699	1.0			
(17) Hispanic American-owned DBE	21	$3,444	$3,444	0.5			
(18) Native American-owned DBE	1	$13	$13	0.0			
(19) Unknown minority-owned DBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-5.
Time period: July 1, 2009 - June 30, 2013
Contract area: Goods and support services
Contract role: Prime Contracts and Subcontracts
Region: Statewide
Funding source: All sources
Goals: Projects with and without goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity Index
(1) All businesses	755	$190,203	$190,203				
(2) Minority- and woman-owned	146	$21,834	$21,834	11.5	21.3	-9.8	54.0
(3) White woman-owned	122	$11,367	$11,367	6.0	11.0	-5.0	54.5
(4) Minority-owned	24	$10,466	$10,466	5.5	10.3	-4.8	53.4
(5) Black American-owned	18	$10,071	$10,127	5.3	8.0	-2.7	66.3
(6) Asian Pacific American-owned	1	$20	$20	0.0	0.0	0.0	45.4
(7) Subcontinent Asian American-owned	0	$0	$0	0.0	0.1	-0.1	0.0
(8) Hispanic American-owned	3	$318	$320	0.2	2.1	-1.9	7.9
(9) Native American-owned	0	$0	$0	0.0	0.0	0.0	0.0
(10) Unknown minority-owned	2	$58					
(11) DBE-certified	39	$9,231	$9,231	4.9			
(12) White woman-owned DBE	29	$1,378	$1,378	0.7			
(13) Minority-owned DBE	10	$7,853	$7,853	4.1			
(14) Black American-owned DBE	10	$7,853	$7,853	4.1			
(15) Asian Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	$0	$0	0.0			
(17) Hispanic American-owned DBE	0	$0	$0	0.0			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown minority-owned DBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-6.
Time period: July 1, 2009 - June 30, 2011
Contract area: Construction; professional services; and goods and support services
Contract role: Prime Contracts and Subcontracts
Region: Statewide
Funding source: All sources
Goals: Projects with and without goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	12,684	$3,858,642	$3,858,642				
(2) Minority- and woman-owned	3,612	$385,236	$385,236	10.0	11.6	-1.7	85.8
(3) White woman-owned	2,695	$226,400	$226,400	5.9	8.4	-2.5	69.8
(4) Minority-owned	917	$158,836	$158,836	4.1	3.2	0.9	127.6
(5) Black American-owned	248	$63,502	$63,733	1.7	1.6	0.1	105.0
(6) Asian Pacific American-owned	343	$22,560	$22,642	0.6	0.2	0.3	200+
(7) Subcontinent Asian American-owned	156	$15,735	$15,792	0.4	0.6	-0.2	73.0
(8) Hispanic American-owned	101	$12,524	$12,569	0.3	0.7	-0.4	48.0
(9) Native American-owned	59	$43,940	$44,099	1.1	0.2	1.0	200+
(10) Unknown minority-owned	10	$574					
(11) DBE-certified	2,225	$228,553	$228,553	5.9			
(12) White woman-owned DBE	1,795	$152,586	$152,586	4.0			
(13) Minority-owned DBE	430	$75,967	$75,967	2.0			
(14) Black American-owned DBE	205	$52,093	$52,097	1.4			
(15) Asian Pacific American-owned DBE	74	$10,209	$10,210	0.3			
(16) Subcontinent Asian American-owned DBE	59	$3,573	$3,573	0.1			
(17) Hispanic American-owned DBE	77	$3,872	$3,873	0.1			
(18) Native American-owned DBE	14	$6,213	$6,214	0.2			
(19) Unknown minority-owned DBE	1	$6					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-7.
Time period: July 1, 2011 - June 30, 2013
Contract area: Construction; professional services; and goods and support services
Contract role: Prime Contracts and Subcontracts
Region: Statewide
Funding source: All sources
Goals: Projects with and without goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization-Availability	(g) Disparity Index
(1) All businesses	8,502	$2,574,856	$2,574,856				
(2) Minority- and woman-owned	2,957	$361,799	$361,799	14.1	11.4	2.7	123.4
(3) White woman-owned	2,084	$249,236	$249,236	9.7	7.9	1.8	122.8
(4) Minority-owned	873	$112,563	$112,563	4.4	3.5	0.9	124.7
(5) Black American-owned	242	$29,027	$29,034	1.1	1.8	-0.7	63.3
(6) Asian Pacific American-owned	313	$22,010	$22,015	0.9	0.2	0.6	200+
(7) Subcontinent Asian American-owned	150	$8,840	$8,842	0.3	0.6	-0.3	57.3
(8) Hispanic American-owned	111	$10,213	$10,215	0.4	0.6	-0.2	62.4
(9) Native American-owned	55	$42,447	$42,457	1.6	0.2	1.4	200+
(10) Unknown minority-owned	2	$26					
(11) DBE-certified	2,019	$182,104	$182,104	7.1			
(12) White woman-owned DBE	1,604	$142,134	$142,134	5.5			
(13) Minority-owned DBE	415	$39,970	$39,970	1.6			
(14) Black American-owned DBE	156	$17,066	$17,068	0.7			
(15) Asian Pacific American-owned DBE	84	$10,452	$10,453	0.4			
(16) Subcontinent Asian American-owned DBE	95	$3,277	$3,277	0.1			
(17) Hispanic American-owned DBE	70	$3,307	$3,307	0.1			
(18) Native American-owned DBE	9	$5,865	$5,865	0.2			
(19) Unknown minority-owned DBE	1	$3					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-8.
Time period: July 1, 2009 - June 30, 2013
Contract area: Construction; professional services; and goods and support services
Contract role: Prime Contracts
Region: Statewide
Funding source: All sources
Goals: Projects with and without goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	8,263	$4,686,448	$4,686,448				
(2) Minority- and woman-owned	818	$166,138	$166,138	3.5	8.5	-5.0	41.6
(3) White woman-owned	514	$107,606	$107,606	2.3	6.2	-3.9	37.1
(4) Minority-owned	304	$58,532	$58,532	1.2	2.3	-1.1	53.5
(5) Black American-owned	41	$12,049	$12,105	0.3	1.1	-0.9	23.0
(6) Asian Pacific American-owned	71	$6,069	$6,097	0.1	0.2	-0.1	62.1
(7) Subcontinent Asian American-owned	150	$19,113	$19,201	0.4	0.5	-0.1	76.8
(8) Hispanic American-owned	12	$11,021	$11,072	0.2	0.3	-0.1	78.0
(9) Native American-owned	25	$10,011	$10,057	0.2	0.2	0.0	129.5
(10) Unknown minority-owned	5	$270					
(11) DBE-certified	317	$81,108	$81,108	1.7			
(12) White woman-owned DBE	216	$55,878	$55,878	1.2			
(13) Minority-owned DBE	101	$25,230	$25,230	0.5			
(14) Black American-owned DBE	25	$9,679	$9,679	0.2			
(15) Asian Pacific American-owned DBE	42	$2,910	$2,910	0.1			
(16) Subcontinent Asian American-owned DBE	16	$2,868	$2,868	0.1			
(17) Hispanic American-owned DBE	0	$0	$0	0.0			
(18) Native American-owned DBE	18	$9,773	$9,773	0.2			
(19) Unknown minority-owned DBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-9.
Time period: July 1, 2009 - June 30, 2013
Contract area: Construction; professional services; and goods and support services
Contract role: Subcontracts
Region: Statewide
Funding source: All sources
Goals: Projects with and without goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity Index
(1) All businesses	12,923	$1,747,050	$1,747,050				
(2) Minority- and woman-owned	5,751	$580,897	$580,897	33.3	19.6	13.6	169.6
(3) White woman-owned	4,265	$368,030	$368,030	21.1	13.6	7.5	155.1
(4) Minority-owned	1,486	$212,867	$212,867	12.2	6.0	6.2	200+
(5) Black American-owned	449	$80,480	$80,605	4.6	3.1	1.5	149.7
(6) Asian Pacific American-owned	585	$38,501	$38,561	2.2	0.3	1.9	200+
(7) Subcontinent Asian American-owned	156	$5,463	$5,472	0.3	0.7	-0.4	45.3
(8) Hispanic American-owned	200	$11,716	$11,734	0.7	1.6	-1.0	41.3
(9) Native American-owned	89	$76,377	$76,495	4.4	0.3	4.1	200+
(10) Unknown minority-owned	7	$331					
(11) DBE-certified	3,927	$329,550	$329,550	18.9			
(12) White woman-owned DBE	3,183	$238,843	$238,843	13.7			
(13) Minority-owned DBE	744	$90,707	$90,707	5.2			
(14) Black American-owned DBE	336	$59,481	$59,486	3.4			
(15) Asian Pacific American-owned DBE	116	$17,752	$17,753	1.0			
(16) Subcontinent Asian American-owned DBE	138	$3,982	$3,982	0.2			
(17) Hispanic American-owned DBE	147	$7,179	$7,180	0.4			
(18) Native American-owned DBE	5	$2,305	$2,306	0.1			
(19) Unknown minority-owned DBE	2	$9					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-10.
Time period: July 1, 2009 - June 30, 2013
Contract area: Construction; professional services; and goods and support services
Contract role: Prime Contracts
Region: Statewide
Funding source: All sources
Goals: Projects with and without goals

Small prime contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	7,411	$1,280,010	$1,280,010				
(2) Minority- and woman-owned	753	$90,898	$90,898	7.1	14.6	-7.5	48.5
(3) White woman-owned	480	$63,262	$63,262	4.9	12.0	-7.1	41.1
(4) Minority-owned	273	$27,636	$27,636	2.2	2.6	-0.5	82.5
(5) Black American-owned	28	$2,182	$2,203	0.2	0.9	-0.7	18.8
(6) Asian Pacific American-owned	68	$3,980	$4,019	0.3	0.4	0.0	88.9
(7) Subcontinent Asian American-owned	144	$13,741	$13,877	1.1	0.7	0.4	154.1
(8) Hispanic American-owned	4	$285	$287	0.0	0.4	-0.4	5.1
(9) Native American-owned	24	$7,178	$7,249	0.6	0.2	0.4	200+
(10) Unknown minority-owned	5	$270					
(11) DBE-certified	297	$52,989	$52,989	4.1			
(12) White woman-owned DBE	206	$39,427	$39,427	3.1			
(13) Minority-owned DBE	91	$13,562	$13,562	1.1			
(14) Black American-owned DBE	17	$1,890	$1,890	0.1			
(15) Asian Pacific American-owned DBE	41	$1,863	$1,863	0.1			
(16) Subcontinent Asian American-owned DBE	16	$2,868	$2,868	0.2			
(17) Hispanic American-owned DBE	0	$0	$0	0.0			
(18) Native American-owned DBE	17	$6,940	$6,940	0.5			
(19) Unknown minority-owned DBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-11.
Time period: July 1, 2009 - June 30, 2013
Contract area: Construction; professional services; and goods and support services
Contract role: Prime Contracts
Region: Statewide
Funding source: All sources
Goals: Projects with and without goals

Large prime contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	852	$3,406,438	$3,406,438				
(2) Minority- and woman-owned	65	$75,240	$75,240	2.2	6.2	-4.0	35.5
(3) White woman-owned	34	$44,344	$44,344	1.3	4.0	-2.7	32.6
(4) Minority-owned	31	$30,896	$30,896	0.9	2.2	-1.3	40.7
(5) Black American-owned	13	$9,868	$9,868	0.3	1.2	-0.9	24.1
(6) Asian Pacific American-owned	3	$2,089	$2,089	0.1	0.2	-0.1	39.4
(7) Subcontinent Asian American-owned	6	$5,371	$5,371	0.2	0.5	-0.3	33.6
(8) Hispanic American-owned	8	$10,736	$10,736	0.3	0.3	0.1	126.0
(9) Native American-owned	1	$2,832	$2,832	0.1	0.2	-0.1	55.0
(10) Unknown minority-owned	0	$0					
(11) DBE-certified	20	$28,118	$28,118	0.8			
(12) White woman-owned DBE	10	$16,450	$16,450	0.5			
(13) Minority-owned DBE	10	$11,668	$11,668	0.3			
(14) Black American-owned DBE	8	$7,789	$7,789	0.2			
(15) Asian Pacific American-owned DBE	1	$1,047	$1,047	0.0			
(16) Subcontinent Asian American-owned DBE	0	$0	$0	0.0			
(17) Hispanic American-owned DBE	0	$0	$0	0.0			
(18) Native American-owned DBE	1	$2,832	$2,832	0.1			
(19) Unknown minority-owned DBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-12.
Time period: July 1, 2009 - June 30, 2013
Contract area: Construction; professional services; and goods and support services
Contract role: Prime Contracts and Subcontracts
Region: North
Funding source: All sources
Goals: Projects with and without goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity Index
(1) All businesses	6,362	$1,549,756	$1,549,756				
(2) Minority- and woman-owned	2,064	$180,462	$180,462	11.6	14.4	-2.8	80.6
(3) White woman-owned	1,428	$119,744	$119,744	7.7	11.4	-3.7	67.9
(4) Minority-owned	636	$60,718	$60,718	3.9	3.1	0.9	128.1
(5) Black American-owned	148	$14,036	$14,084	0.9	1.8	-0.9	50.2
(6) Asian Pacific American-owned	284	$10,857	$10,894	0.7	0.1	0.6	200+
(7) Subcontinent Asian American-owned	107	$6,719	$6,742	0.4	0.3	0.1	143.8
(8) Hispanic American-owned	63	$3,592	$3,605	0.2	0.8	-0.5	30.9
(9) Native American-owned	28	$25,306	$25,393	1.6	0.1	1.6	200+
(10) Unknown minority-owned	6	$208					
(11) DBE-certified	1,367	$114,399	$114,399	7.4			
(12) White woman-owned DBE	1,097	$94,912	$94,912	6.1			
(13) Minority-owned DBE	270	$19,487	$19,487	1.3			
(14) Black American-owned DBE	134	$12,843	$12,849	0.8			
(15) Asian Pacific American-owned DBE	30	$1,910	$1,910	0.1			
(16) Subcontinent Asian American-owned DBE	73	$2,379	$2,380	0.2			
(17) Hispanic American-owned DBE	23	$318	$318	0.0			
(18) Native American-owned DBE	8	$2,028	$2,029	0.1			
(19) Unknown minority-owned DBE	2	$9					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-13.
Time period: July 1, 2009 - June 30, 2013
Contract area: Construction; professional services; and goods and support services
Contract role: Prime Contracts and Subcontracts
Region: Central
Funding source: All sources
Goals: Projects with and without goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity Index
(1) All businesses	10,000	$2,953,438	$2,953,438				
(2) Minority- and woman-owned	2,735	$353,068	$353,068	12.0	12.4	-0.4	96.6
(3) White woman-owned	1,885	$188,131	$188,131	6.4	8.6	-2.2	74.0
(4) Minority-owned	850	$164,937	$164,937	5.6	3.8	1.8	148.4
(5) Black American-owned	210	$57,190	$57,327	1.9	1.8	0.2	109.6
(6) Asian Pacific American-owned	290	$16,386	$16,425	0.6	0.4	0.2	154.8
(7) Subcontinent Asian American-owned	156	$15,052	$15,088	0.5	0.8	-0.3	61.1
(8) Hispanic American-owned	116	$16,022	$16,061	0.5	0.6	-0.1	83.9
(9) Native American-owned	72	$59,892	$60,035	2.0	0.1	1.9	200+
(10) Unknown minority-owned	6	$393					
(11) DBE-certified	1,672	$181,221	$181,221	6.1			
(12) White woman-owned DBE	1,284	$116,953	$116,953	4.0			
(13) Minority-owned DBE	388	$64,268	$64,268	2.2			
(14) Black American-owned DBE	139	$42,087	$42,087	1.4			
(15) Asian Pacific American-owned DBE	77	$3,818	$3,818	0.1			
(16) Subcontinent Asian American-owned DBE	61	$3,977	$3,977	0.1			
(17) Hispanic American-owned DBE	96	$4,337	$4,337	0.1			
(18) Native American-owned DBE	15	$10,050	$10,050	0.3			
(19) Unknown minority-owned DBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-14.
Time period: July 1, 2009 - June 30, 2013
Contract area: Construction; professional services; and goods and support services
Contract role: Prime Contracts and Subcontracts
Region: South
Funding source: All sources
Goals: Projects with and without goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	4,824	$1,930,304	$1,930,304				
(2) Minority- and woman-owned	1,770	$213,505	$213,505	11.1	7.9	3.1	139.6
(3) White woman-owned	1,466	$167,761	$167,761	8.7	5.0	3.7	173.6
(4) Minority-owned	304	$45,744	$45,744	2.4	2.9	-0.5	81.3
(5) Black American-owned	132	$21,303	$21,303	1.1	1.4	-0.3	81.2
(6) Asian Pacific American-owned	82	$17,327	$17,327	0.9	0.2	0.7	200+
(7) Subcontinent Asian American-owned	43	$2,804	$2,804	0.1	0.4	-0.3	36.4
(8) Hispanic American-owned	33	$3,122	$3,122	0.2	0.6	-0.4	26.6
(9) Native American-owned	14	$1,189	$1,189	0.1	0.4	-0.3	16.9
(10) Unknown minority-owned	0	$0					
(11) DBE-certified	1,205	$115,037	$115,037	6.0			
(12) White woman-owned DBE	1,018	$82,855	$82,855	4.3			
(13) Minority-owned DBE	187	$32,182	$32,182	1.7			
(14) Black American-owned DBE	88	$14,229	$14,229	0.7			
(15) Asian Pacific American-owned DBE	51	$14,934	$14,934	0.8			
(16) Subcontinent Asian American-owned DBE	20	$495	$495	0.0			
(17) Hispanic American-owned DBE	28	$2,524	$2,524	0.1			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown minority-owned DBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-15.
Time period: July 1, 2009 - June 30, 2013
Contract area: Construction; professional services; and goods and support services
Contract role: Prime Contracts and Subcontracts
Region: Statewide
Funding source: All sources
Goals: Projects with M/WBE or DBE goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity Index
(1) All businesses	13,567	$5,367,174	$5,367,174				
(2) Minority- and woman-owned	5,407	$655,164	$655,164	12.2	10.7	1.5	113.9
(3) White woman-owned	3,998	$425,304	$425,304	7.9	7.8	0.2	102.0
(4) Minority-owned	1,409	$229,860	$229,860	4.3	2.9	1.3	145.3
(5) Black American-owned	443	$80,634	$80,750	1.5	1.5	0.0	97.4
(6) Asian Pacific American-owned	536	$40,161	$40,219	0.7	0.2	0.6	200+
(7) Subcontinent Asian American-owned	146	$11,169	$11,185	0.2	0.4	-0.1	59.0
(8) Hispanic American-owned	179	$11,553	$11,569	0.2	0.6	-0.4	33.4
(9) Native American-owned	98	$86,013	$86,137	1.6	0.2	1.4	200+
(10) Unknown minority-owned	7	$331					
(11) DBE-certified	3,736	$380,829	$380,829	7.1			
(12) White woman-owned DBE	3,024	$278,634	$278,634	5.2			
(13) Minority-owned DBE	712	$102,195	$102,195	1.9			
(14) Black American-owned DBE	334	$59,707	$59,712	1.1			
(15) Asian Pacific American-owned DBE	114	$18,238	$18,239	0.3			
(16) Subcontinent Asian American-owned DBE	118	$5,256	$5,256	0.1			
(17) Hispanic American-owned DBE	127	$7,042	$7,043	0.1			
(18) Native American-owned DBE	17	$11,943	$11,944	0.2			
(19) Unknown minority-owned DBE	2	$9					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-16.
Time period: July 1, 2009 - June 30, 2013
Contract area: Construction; professional services; and goods and support services
Contract role: Prime Contracts and Subcontracts
Region: Statewide
Funding source: All sources
Goals: Projects without goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	7,619	$1,066,325	$1,066,325				
(2) Minority- and woman-owned	1,162	$91,871	$91,871	8.6	15.6	-7.0	55.1
(3) White woman-owned	781	$50,332	$50,332	4.7	10.3	-5.6	45.7
(4) Minority-owned	381	$41,539	$41,539	3.9	5.3	-1.4	73.3
(5) Black American-owned	47	$11,895	$11,973	1.1	2.2	-1.1	50.6
(6) Asian Pacific American-owned	120	$4,409	$4,438	0.4	0.6	-0.2	72.8
(7) Subcontinent Asian American-owned	160	$13,407	$13,494	1.3	1.7	-0.4	74.5
(8) Hispanic American-owned	33	$11,184	$11,257	1.1	0.7	0.3	142.0
(9) Native American-owned	16	$374	$377	0.0	0.1	0.0	43.6
(10) Unknown minority-owned	5	$270					
(11) DBE-certified	508	$29,829	$29,829	2.8			
(12) White woman-owned DBE	375	$16,087	$16,087	1.5			
(13) Minority-owned DBE	133	$13,743	$13,743	1.3			
(14) Black American-owned DBE	27	$9,453	$9,453	0.9			
(15) Asian Pacific American-owned DBE	44	$2,424	$2,424	0.2			
(16) Subcontinent Asian American-owned DBE	36	$1,594	$1,594	0.1			
(17) Hispanic American-owned DBE	20	$137	$137	0.0			
(18) Native American-owned DBE	6	$135	$135	0.0			
(19) Unknown minority-owned DBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-17.
Time period: July 1, 2009 - June 30, 2013
Contract area: Construction; professional services; and goods and support services
Contract role: Prime Contracts and Subcontracts
Region: Statewide
Funding source: Federal
Goals: Projects with and without goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity Index
(1) All businesses	17,090	$5,457,061	$5,457,061				
(2) Minority- and woman-owned	5,994	$641,992	$641,992	11.8	11.2	0.6	105.2
(3) White woman-owned	4,337	$422,245	$422,245	7.7	8.1	-0.4	95.3
(4) Minority-owned	1,657	$219,747	$219,747	4.0	3.1	1.0	131.4
(5) Black American-owned	444	$53,110	$53,239	1.0	1.4	-0.4	69.5
(6) Asian Pacific American-owned	631	$42,868	$42,972	0.8	0.3	0.5	200+
(7) Subcontinent Asian American-owned	275	$22,429	$22,484	0.4	0.6	-0.2	65.4
(8) Hispanic American-owned	195	$22,202	$22,256	0.4	0.6	-0.2	72.9
(9) Native American-owned	103	$78,606	$78,796	1.4	0.2	1.2	200+
(10) Unknown minority-owned	9	$531					
(11) DBE-certified	3,985	$351,259	$351,259	6.4			
(12) White woman-owned DBE	3,190	$269,468	$269,468	4.9			
(13) Minority-owned DBE	795	$81,791	$81,791	1.5			
(14) Black American-owned DBE	327	$35,346	$35,350	0.6			
(15) Asian Pacific American-owned DBE	154	$20,501	$20,503	0.4			
(16) Subcontinent Asian American-owned DBE	153	$6,842	$6,843	0.1			
(17) Hispanic American-owned DBE	138	$7,072	$7,073	0.1			
(18) Native American-owned DBE	21	$12,021	$12,023	0.2			
(19) Unknown minority-owned DBE	2	$9					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-18.
Time period: July 1, 2009 - June 30, 2013
Contract area: Construction; professional services; and goods and support services
Contract role: Prime Contracts and Subcontracts
Region: Statewide
Funding source: State
Goals: Projects with and without goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	4,096	$976,437	$976,437				
(2) Minority- and woman-owned	575	$105,043	$105,043	10.8	13.5	-2.7	79.7
(3) White woman-owned	442	$53,391	$53,391	5.5	8.6	-3.2	63.4
(4) Minority-owned	133	$51,652	$51,652	5.3	4.9	0.4	108.6
(5) Black American-owned	46	$39,419	$39,472	4.0	3.1	1.0	131.9
(6) Asian Pacific American-owned	25	$1,702	$1,704	0.2	0.1	0.1	152.5
(7) Subcontinent Asian American-owned	31	$2,146	$2,149	0.2	0.3	-0.1	79.3
(8) Hispanic American-owned	17	$534	$535	0.1	1.2	-1.2	4.4
(9) Native American-owned	11	$7,781	$7,792	0.8	0.2	0.6	200+
(10) Unknown minority-owned	3	$70					
(11) DBE-certified	259	$59,399	$59,399	6.1			
(12) White woman-owned DBE	209	$25,253	$25,253	2.6			
(13) Minority-owned DBE	50	$34,146	$34,146	3.5			
(14) Black American-owned DBE	34	$33,814	$33,814	3.5			
(15) Asian Pacific American-owned DBE	4	$161	$161	0.0			
(16) Subcontinent Asian American-owned DBE	1	$8	$8	0.0			
(17) Hispanic American-owned DBE	9	$107	$107	0.0			
(18) Native American-owned DBE	2	$57	$57	0.0			
(19) Unknown minority-owned DBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-19.
Time period: July 1, 2009 - June 30, 2013
Contract area: Construction; professional services; and goods and support services
Contract role: Prime Contracts and Subcontracts
Region: Statewide
Funding source: Federal
Goals: Projects with and without goals

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	17,090	$5,457,061	$5,457,061				
(2) Minority- and woman-owned	5,994	$641,992	$641,992	11.8	10.9	0.9	108.4
(3) White woman-owned	4,337	$422,245	$422,245	7.7	8.0	-0.3	96.4
(4) Minority-owned	1,657	$219,747	$219,747	4.0	2.8	1.2	142.4
(5) Black American-owned	444	$53,110	$53,239	1.0	1.2	-0.2	80.2
(6) Asian Pacific American-owned	631	$42,868	$42,972	0.8	0.3	0.5	200+
(7) Subcontinent Asian American-owned	275	$22,429	$22,484	0.4	0.6	-0.2	68.0
(8) Hispanic American-owned	195	$22,202	$22,256	0.4	0.5	-0.1	76.4
(9) Native American-owned	103	$78,606	$78,796	1.4	0.2	1.2	200+
(10) Unknown minority-owned	9	$531					
(11) DBE-certified	3,985	$351,259	$351,259	6.4			
(12) White woman-owned DBE	3,190	$269,468	$269,468	4.9			
(13) Minority-owned DBE	795	$81,791	$81,791	1.5			
(14) Black American-owned DBE	327	$35,346	$35,350	0.6			
(15) Asian Pacific American-owned DBE	154	$20,501	$20,503	0.4			
(16) Subcontinent Asian American-owned DBE	153	$6,842	$6,843	0.1			
(17) Hispanic American-owned DBE	138	$7,072	$7,073	0.1			
(18) Native American-owned DBE	21	$12,021	$12,023	0.2			
(19) Unknown minority-owned DBE	2	$9					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-20.
Time period: July 1, 2009 - June 30, 2013
Contract area: Construction
Contract role: Prime Contracts and Subcontracts
Region: Statewide
Funding source: Federal
Goals: Projects with and without goals

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization-Availability	(g) Disparity Index
(1) All businesses	13,959	$4,774,251	$4,774,251				
(2) Minority- and woman-owned	5,089	$561,710	$561,710	11.8	10.8	1.0	109.3
(3) White woman-owned	3,988	$396,478	$396,478	8.3	8.5	-0.2	97.7
(4) Minority-owned	1,101	$165,232	$165,232	3.5	2.3	1.2	152.4
(5) Black American-owned	320	$45,886	$45,943	1.0	1.3	-0.3	76.8
(6) Asian Pacific American-owned	482	$31,195	$31,234	0.7	0.1	0.6	200+
(7) Subcontinent Asian American-owned	30	$1,331	$1,332	0.0	0.1	-0.1	24.4
(8) Hispanic American-owned	169	$8,331	$8,341	0.2	0.6	-0.4	28.9
(9) Native American-owned	94	$78,282	$78,381	1.6	0.2	1.4	200+
(10) Unknown minority-owned	6	$208					
(11) DBE-certified	3,401	$317,308	$317,308	6.6			
(12) White woman-owned DBE	2,955	$257,221	$257,221	5.4			
(13) Minority-owned DBE	446	$60,088	$60,088	1.3			
(14) Black American-owned DBE	227	$30,854	$30,859	0.6			
(15) Asian Pacific American-owned DBE	54	$13,426	$13,428	0.3			
(16) Subcontinent Asian American-owned DBE	25	$152	$152	0.0			
(17) Hispanic American-owned DBE	118	$3,639	$3,639	0.1			
(18) Native American-owned DBE	20	$12,008	$12,010	0.3			
(19) Unknown minority-owned DBE	2	$9					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-21.
Time period: July 1, 2009 - June 30, 2013
Contract area: Professional services
Contract role: Prime Contracts and Subcontracts
Region: Statewide
Funding source: Federal
Goals: Projects with and without goals

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	2,935	$651,683	$651,683				
(2) Minority- and woman-owned	883	$77,333	$77,333	11.9	11.0	0.8	107.7
(3) White woman-owned	337	$25,206	$25,206	3.9	4.1	-0.2	95.0
(4) Minority-owned	546	$52,127	$52,127	8.0	6.9	1.0	115.1
(5) Black American-owned	115	$4,856	$4,887	0.7	0.9	-0.2	80.2
(6) Asian Pacific American-owned	148	$11,654	$11,726	1.8	1.7	0.1	104.2
(7) Subcontinent Asian American-owned	245	$21,099	$21,230	3.3	4.2	-1.0	76.9
(8) Hispanic American-owned	26	$13,872	$13,958	2.1	0.0	2.1	200+
(9) Native American-owned	9	$324	$326	0.1	0.0	0.0	200+
(10) Unknown minority-owned	3	$323					
(11) DBE-certified	577	$33,297	$33,297	5.1			
(12) White woman-owned DBE	229	$11,744	$11,744	1.8			
(13) Minority-owned DBE	348	$21,554	$21,554	3.3			
(14) Black American-owned DBE	99	$4,341	$4,341	0.7			
(15) Asian Pacific American-owned DBE	100	$7,075	$7,075	1.1			
(16) Subcontinent Asian American-owned DBE	128	$6,691	$6,691	1.0			
(17) Hispanic American-owned DBE	20	$3,433	$3,433	0.5			
(18) Native American-owned DBE	1	$13	$13	0.0			
(19) Unknown minority-owned DBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-22.
Time period: July 1, 2009 - June 30, 2013
Contract area: Goods and support services
Contract role: Prime Contracts and Subcontracts
Region: Statewide
Funding source: Federal
Goals: Projects with and without goals

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	196	$31,127	$31,127				
(2) Minority- and woman-owned	22	$2,950	$2,950	9.5	20.7	-11.3	45.7
(3) White woman-owned	12	$561	$561	1.8	19.0	-17.2	9.5
(4) Minority-owned	10	$2,388	$2,388	7.7	1.7	5.9	200+
(5) Black American-owned	9	$2,369	$2,369	7.6	1.6	6.0	200+
(6) Asian Pacific American-owned	1	$20	$20	0.1	0.0	0.0	200+
(7) Subcontinent Asian American-owned	0	$0	$0	0.0	0.1	-0.1	0.0
(8) Hispanic American-owned	0	$0	$0	0.0	0.1	-0.1	0.0
(9) Native American-owned	0	$0	$0	0.0	0.0	0.0	0.0
(10) Unknown minority-owned	0	$0					
(11) DBE-certified	7	$653	$653	2.1			
(12) White woman-owned DBE	6	$503	$503	1.6			
(13) Minority-owned DBE	1	$150	$150	0.5			
(14) Black American-owned DBE	1	$150	$150	0.5			
(15) Asian Pacific American-owned DBE	0	$0	$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	$0	$0	0.0			
(17) Hispanic American-owned DBE	0	$0	$0	0.0			
(18) Native American-owned DBE	0	$0	$0	0.0			
(19) Unknown minority-owned DBE	0	$0					
(20) White male-owned DBE	0	$0	$0	0.0			
(21) Unknown DBE	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "White woman-owned" refers to non-Hispanic white woman-owned businesses.

* Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.